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# LOS CONFUNDIDOS: DE-CONFLATING LATINOS/AS' RACE AND ETHNICITY

*GLORIA SANDRINO-GLASSER†*

INTRODUCTION .....	71
I. LATINOS: A DEMOGRAPHIC PORTRAIT.....	75
A. Latinos: Dispelling the Legacy of Homogenization.....	75
B. Los Confundidos: Who are We? (¿Quién Somos?).....	77
1. Mexican-Americans: The Native Sons and Daughters.....	77
2. Mainland Puerto Ricans: The Undecided.....	81
3. Cuban-Americans: Last to Come, Most to Gain.....	85
II. THE CONFLATION: AN OVERVIEW.....	90
A. The Conflation in Context.....	95
1. The Conflation: Parts of the Whole.....	102
2. The Conflation Institutionalized: The Sums of All Parts.....	103
B. The Conflation: Concepts and Definitions.....	104
1. Nationality.....	104
2. Race.....	105
3. Other Definitions.....	107
III. DE-CONFLATING RACE AND NATIONALITY IN UNITED STATES SOCIETY.....	108
A. The Conflation in the Nineteenth Century: The Roots of Constructed Hispanic Homogenization.....	111
1. From Natives to "Cholos," "Greasers" and Mustachioed Banditos: Early Portrayals of Mexican-Americans.....	111
a. Californianos/as: The Mexicans of California.....	111
b. "Good Women," "Bad Women": The Californianas.....	117

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† Associate Professor of Law, California Western School of Law. J.D., Harvard Law School 1984; B.A. with Highest Honors, Rutgers College 1981. This Article is dedicated to my family, who has given me love and encouragement every step of the way, and to all Latinos/as, who have given me inspiration and motivation to research and write on this topic. I received more encouragement and assistance in the preparation and completion of this Article than I could possibly acknowledge. I am indebted to those who undertook the vast and unpromising task of commenting on earlier drafts of this Article. I am particularly grateful to my colleagues Robert Chang and Frank Valdes for talking through the inception of this Article with me. In addition, I owe special thanks to Stephen Glasser for his encouragement, support, and suggestions. Finally, I thank my research assistants, Aimee Caso, Bethany Caracuzzo, Rick Hartman, Kelly Langford and Dale Montpelier; the librarians at California Western, Jane Petitmermet, Linda Weathers, and Bill Bookheim; my secretary, Mary-Ellen Norvell; and photocopying specialist Vicky Pfeffer, all whom have been indispensable to this Article.

2.	“Boricuas” and Natives: Images of Puerto Ricans .....	120
B.	The Conflation in the Twentieth Century: Formal Confusion of Race and Nationality .....	123
1.	Examples of Conflation in the Early Twentieth Century .....	123
a.	Los Angeles County Health Department Statistics .....	124
b.	California’s “Mexican Fact Finding Committee” .....	125
2.	The National Census .....	125
a.	The Censuses: 1940, 1950, 1960 and 1970: Conflation by Another Race .....	126
b.	The 1980 Census .....	128
IV.	THE CONFLATION IN CONTEMPORARY JURISPRUDENCE .....	131
A.	Judicial Constructions of Race and Nationality .....	131
1.	Race .....	131
2.	Nationality/National Origin .....	133
a.	“National Origin” and the Equal Protection Clause .....	134
b.	“National Origin” and Title VII .....	135
B.	The Conflation, the Equal Protection Clause and “National Origin”: Language as a Surrogate for Race .....	137
1.	<i>Hernandez v. Texas</i> .....	138
a.	The Conflation and the Court’s Construction of Race .....	138
b.	Perpetuating the Construction of Race Through Black/White Paradigm .....	139
c.	Marginalized by the Intersection of Ethnicity and Race .....	140
2.	<i>Soberal-Perez v. Heckler</i> .....	141
C.	The Conflation, Title VII and “National Origin” .....	142
1.	<i>Manzanares v. Safeway Stores, Inc.</i> .....	144
2.	<i>Olagues v. Russoniello</i> .....	145
3.	<i>Cardona v. American Express</i> .....	146
C.	The Conflation, Bilingual Education and Language Rights .....	147
V.	THE AFTERMATH: THE LEGACY OF THE CONFLATION IN LAW AND SOCIETY .....	150
A.	The Conflation in Society: Lessons and Beyond .....	151
1.	Latinos as the Foreign Other: Exclusion From the Imaginary Nation .....	151
2.	Latinos in the “White/Black” Racial Paradigm .....	153
3.	Formalized Conflation: The “Hispanic Label” .....	155
VI.	CRITICAL RACE THEORY AND LATINOS: PERSPECTIVES AND NEW DIRECTIONS .....	157
A.	Critical Race Theory: An Overview .....	157
B.	Critical Race Theory and Diversity: “Talking Across Our Spaces” .....	159
C.	Latino Voice and Storytelling .....	160
VII.	CONCLUSION .....	161

## INTRODUCTION

I am not African.

*African waters the roots of my tree, but I cannot return.*

I am not Taíno.

*I am a late leaf of that ancient tree*

and my roots reach into the soil of two Americas.

*Taíno is in me, but there is no way back.*

I am not European, though I have dreamt of those cities.

*Europe lives in me but I have no home there.<sup>1</sup>*

As the poem above illustrates, the Latino/a<sup>2</sup> identity in the United States consists of multiple national and racial identities, which are often conflated or fused, but nevertheless essential parts of the whole. The conflation's residue is confusion: to isolate, to disempower, and oppress. Its Legacy: Los Confundidos.<sup>3</sup>

In the poem, two Latinas, a mother and daughter, affirm and construct their Latina identity, with its rich racial and cultural mix, while deconstructing the popular myths of the dominant culture. The conversation illustrates the conflation of Latinos' race and nationality, with one woman referring to race and the other to nationality. The confusion is obvious; but the conceptual and ideological mixtures that underlie the confusion are powerful. As Suzanne Oboler notes, "reading [this] poem, one is struck by the ways in which *both* self (I am what I am) and other (I am not what I am not) are fundamental to the construction of the identities of these individual Latinas—and, one might say, to the ethos of the (Latino)

1. AURORA LEVINS MORALES & ROSARIO MORALES, *GETTING HOME ALIVE* 50 (1986).

2. I prefer to use the term Latino/a for three reasons. First, I see it as an alternative collective designation, which recognizes the Latin American origin of the Latino subpopulations. The "Latino/a" term, derived from "Latin America," links the Latin American origin groups in the United States to Latin America. As such, it preserves the flavor of national origin and political relationship between the United States and Latin America. In that respect, it is culturally neutral. Moreover, it is racially neutral. Secondly, it is a Spanish-language word and as such it is a unifying term for an otherwise diverse group of people. Thirdly, it embodies cultural pluralism as opposed to assimilation. Although I would prefer to use the term "Latino/a" throughout this Article, for practical purposes I will most often use "Latino" to refer to both sexes. It is my belief, as a Latina whose first language is Spanish, that despite the "o" ending, the term Latino is sex neutral. By rules of Spanish orthography, all collective terms when used on a grouping containing both sexes, utilize the masculine ending.

3. I use the term "los confundidos," meaning "the confused ones," deliberately because it connotes two distinct meanings. On one level, "los confundidos" stands for the notion that Latinos are perceived to be "confused" by others. That the conflation has confused others as to what Latinos really are—a race or a nationality. On another level, "los confundidos" refers to the fact that as Latinos, we are confused due to the socio-historical legacy of the conflation. In my opinion both terms are accurate, and indeed, the legacy of the conflation.

group."<sup>4</sup> E. Ortega and N. Saporta-Sternbach argue that "[i]n constructing herself as a subject, a Latina must dismantle the representation of stereotypes of her self, constructed, framed and projected by the dominant ideology."<sup>5</sup>

This Article explores the conflation of Latinos' race and nationality in American law and society. Like the poem above, this Article attempts to expose the conflation of these two constructs, from its historical roots to its present formalized and institutionalized status, to demonstrate the way the dominant culture has utilized the conflation to homogenize, and thus negate, marginalize, and silence Latinos.

The conflation of Latinos' race and nationality illustrates how the dominant culture has used and continues to use its power to attempt to define and dominate the "Others."<sup>6</sup> In America, the rules that define "race" have been white rules, "even though African-American culture has had a great, though generally unacknowledged, impact on white culture and perhaps on concepts of race as well."<sup>7</sup> Thus, these rules have always existed in a black/white paradigm.<sup>8</sup> As such, when these rules have been and continue to be applied to Latinos, the dominance/subordination process nurtures the conflation in an effort to dominate and oppress. As Frank Valdes says in his thoughtful and powerful work on the conflation of sex, gender, and sexual orientation: "[the conflation] creates and reinforces artificial and oppressive dictates and distinctions that affect all of us."<sup>9</sup>

4. Suzanne Oboler, *The Politics of Labeling: Latino/a Cultural Identities of Self and Others*, 19 LATIN AM. PERSP. 18 (1992).

5. E. Ortega & N. Saporta-Sternbach, *At the Threshold of the Unnamed: Literary Discourse in the Eighties*, in BREAKING BOUNDARIES: LATINA WRITINGS AND CRITICAL READINGS 2-26 (Asunción Horno-Delgado et al. eds., 1989). Suzanne Oboler argues:

The need to dismantle stereotypes is well known and can be traced to the dichotomizing of self and other apparent, for example, in essentializing practices of classical anthropology. Recent critiques of traditional anthropology suggest that the study of the other has been as much about the affirmation of the anthropologist's self as about the construction of the native's otherness. If this is true, then one might ask, how are the dichotomies of self versus other problematized when dealing with bicultural and multicultural peoples? Is not the affirmation of self, and the examination of stereotypes of it, also the affirmation of the internalized? [Citations omitted.]

Oboler, *supra* note 4, at 19.

6. See *infra* notes 117-19 and accompanying text.

7. Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Response To Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 233 (1993).

8. See *infra* notes 365-70 and accompanying text.

9. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 8 (1995). I draw on many of the powerful ideas and issues that Frank Valdes raises in his work for my inspiration and motivation for this Article.

The identification and deconstruction of the conflation and its effect on law and society is significant because of growing numbers of Latinos in American society. Latinos are currently the fastest-growing segment of the United States population, numbering almost 22.8 million in the early 1990s.<sup>10</sup> A systematic demographical examination of Latinos reveals a high rate of population increase, from 6.4% of the population in 1980 to 9% by 1990 (see Table below).<sup>11</sup> This is a result of above average rates of immigration and reproduction during the last two decades.<sup>12</sup> It is expected that by the year 2005 the Latino population will be the largest minority population in the United States.<sup>13</sup>

This Article will focus on the three largest Latino subpopulations: Mexican-Americans,<sup>14</sup> mainland Puerto Ricans,<sup>15</sup> and Cuban-Americans.<sup>16</sup> Although Latinos are often united by language and culture, the population is far from monolithic. Thus, the discourses emerging from each of these different nationalities and spates of migrations are vitally different.<sup>17</sup> The concept of monolithic "pan-

10. See PATRICIA A. MONTGOMERY, U.S. DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 1993* 10 (1994). I cite these statistics reluctantly, because they have also been "manipulated" by the conflationary process. See *infra* notes 226-45 and accompanying text.

11. *LATINOS IN A CHANGING U.S. ECONOMY: COMPARATIVE PERSPECTIVES ON GROWING INEQUALITY* 3 (Rebecca Morales & Frank Bonilla eds., 1993).

Resident Population Distribution for the United States by Race and Hispanic Origin, 1980 and 1990 (in thousands)

	1980		1990		Change	
	Number	%	Number	%	Number	%
Total Population	226,545.8	100.0	248,709.9	100.0	22,164.1	9.8
White	188,371.6	83.1	199,686.1	80.3	11,314.4	6.0
Black	26,495.0	11.7	29,986.1	12.1	3,491.0	13.5
Am. Indian*	1,420.4	0.6	1,959.2	0.8	538.8	37.9
Asian**	3,500.4	1.5	7,273.7	2.9	3,773.2	107.8
Other	6,758.3	3.0	9,804.8	3.9	3,046.5	45.1
Hispanic***	14,608.7	6.4	22,354.1	9.0	7,745.4	53.0

\* American Indian, Eskimo, or Aleut.

\*\* Asian or Pacific Islander. The 1980 number for Asians or Pacific Islanders shown in this table is not entirely comparable with the 1990 count. The 1980 count of 3,500,439 Asians or Pacific Islanders based on 100% tabulations includes only the nine specific Asian or Pacific groups listed separately in the 1980 race item. The 1980 total Asian or Pacific Islander population of 3,726,440 from sample tabulations is comparable to the 1990 count; these figures include groups not listed separately in the race item on the 1980 census form.

\*\*\* Persons of Hispanic origin can be of any race.

U.S. BUREAU OF THE CENSUS, *CURRENT POPULATION SURVEY* (March 1991).

12. See *LATINOS IN A CHANGING U.S. ECONOMY*, *supra* note 11.

13. See U.S. Bureau of the Census, *Current Population Survey*, (March 1992) (unpublished data, on file with author).

14. See *infra* notes 31-43 and accompanying text.

15. *Id.*

16. *Id.*

17. See *infra* notes 30-82 and accompanying text.

Hispanism,"<sup>18</sup> so vigorously espoused by the dominant culture, does not do justice to this diversity. The use of the conflationary term "Hispanic"<sup>19</sup> to categorize Latinos distorts the origin and roots of these populations, preventing and excusing the dominant culture from understanding, acknowledging, and taking into account all the complexities of the Latino culture.

The conflation emerged in nineteenth century America, with the incorporation of the first Latino subpopulations in American society. In 1848 and in 1898, respectively, part or all of the Mexican and Puerto Rican national territory was confiscated as a result of expansionist policies of the United States. Early literary accounts by Anglo-Americans describe the Mexicans as lazy and backward, attributing their lack of intelligence and motivation to the Mexican "race." By the twentieth century, these conflationary images were formalized by government agencies and scientific institutions, and most importantly by the United States Census, with the creation of the label "Hispanic."

The impact of the conflation of Latinos' race and nationality on American law and society is not subtle. The white-created image of Latinos riddled with stereotypes, myths, and half-truths, has had a significant role in explaining the historical treatment and current condition of Latinos.<sup>20</sup> The conflation's divisive force has provided the fuel for the dominant culture to absolve themselves and blame Latinos for existing social and economic inequalities.<sup>21</sup>

18. The term "pan-hispanic" was coined by JUAN BRUCE-NOVOA, *IMAGENES E IDENTIDADES: EL PUERTORRIQUEÑO EN LA LITERATURA* (Asela Rodríguez de la Laguna ed., 1985).

19. See *infra* notes 233-245 and accompanying text. The term "Hispanic" has come into general use in the United States to refer to all people whose ancestry is predominantly from one or more Spanish-speaking countries. The term encompasses great racial and class diversity, obscures gender differences, and even includes people whose primary language is not Spanish.

20. Kimberlé Crenshaw has made a similar argument with respect to whites and African-Americans:

Believing both that Blacks are inferior and that the economy impartially rewards the superior over the inferior, whites see that most Blacks are indeed worse off than whites are, which reinforces their sense that the market is operating "fairly and impartially"; those who should logically be on the bottom are on the bottom. This strengthening of whites' belief in the system in turn reinforces their beliefs that Blacks are indeed inferior. After all, equal opportunity is the rule, and the market is an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority.

Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380 (1988).

21. A prime example of this phenomenon is Proposition 187, a measure that the California electorate overwhelmingly approved in 1994. If ever implemented, Proposition 187 will deny undocumented immigrants access to public benefits and services for which they currently are eligible. CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 54 (Nov. 8, 1994). The Proposition 187 media director blamed the undocumented immigrants for California's economic problems:

This Article de-conflates Latino's race and nationality in American law and society. Part I begins with a demographic portrait of the Latino population, in an attempt to dispel the legacy of homogenization. Part II provides an overview of the conflation. Part III starts with the historical roots of the conflation in the nineteenth century, detailing the conflationary images of each of the Latino subpopulations. Next, it traces the conflation to the twentieth century, detailing its formalized and institutionalized status. Part IV examines the operation of the conflation in contemporary jurisprudence. Part V provides an overview of the legacies of the conflation in law and society. Lastly, Part VI addresses the themes, perspectives and new directions of critical race theory in light of the conflation of Latino's race and nationality.

## I. LATINOS: A DEMOGRAPHIC PORTRAIT

### A. *Latinos: Dispelling the Legacy of Homogenization*

The perceived homogenized Latino population in the United States is in reality a group of distinctive subpopulations that exist because of a myriad of variables that divide the so-called "Hispanic population."<sup>22</sup> The most significant variable is national origin.<sup>23</sup> The three largest subpopulations are Mexican-Americans, mainland Puerto Ricans, and Cuban-Americans.<sup>24</sup> In the mid-1990s Mexican-

Proposition 187 is . . . a logical step toward saving California from economic ruin. Illegal aliens collect welfare payments through post office boxes in San Ysidro, just a 15-minute walk from Mexico. They receive free medical care and flood schools with non-English-speaking students. By flooding the state with 2 million illegal aliens to date, and increasing that figure each of the following 10 years, Mexicans in California would number 15 million to 20 million by 2004. During those 10 years about 5 million to 8 million Californians would have emigrated to other states. If these trends continued, a Mexico-controlled California could vote to establish Spanish as the sole language of California, 10 million more English-speaking Californians could flee, and there could be a statewide vote to leave the Union and annex California to Mexico.

Linda B. Hayes, Letters to the Editor, *California's Prop. 187*, N.Y. TIMES, Oct. 15, 1994, at A18.

22. The Latino population consists of Mexican-Americans, mainland Puerto Ricans, Cuban-Americans, and recent arrivals from other Spanish-speaking countries of Central and South America. However, this Article will concentrate on the three largest Latino populations: Mexican-Americans, mainland Puerto Ricans, and Cuban Americans.

23. At this point, I use the terms "national origin" and "nationality" interchangeably. Each term may be defined as the nation of one's birth.

24. Teresa A. Sullivan notes:

The major national groups identified in the U.S. Census reports are Mexicans, Cubans, 'Central and South Americans' (excluding Brazilians), and 'other Spanish' (excluding Portuguese). Puerto Ricans are also identified separately, although since 1907 they have been U.S. citizens. It is believed that most Hispanos who identify themselves by Spanish origin report themselves as 'other Spanish.'

Teresa A. Sullivan, *A Demographic Portrait*, in HISPANICS IN THE UNITED STATES: A



Americans made up nearly two-thirds of the United States Latino population, mainland Puerto Ricans almost 11 percent, and Cuban-Americans almost 5 percent.<sup>25</sup> In addition to their different places of origin, these three subpopulations also have diverse histories and heritages.

The second variable that distinguishes the Latino subpopulations, other than their histories and cultural forms, is their race: Latinos have an ancient and proud ancestry of predominantly Native American, but with significant Spanish and African infusions.<sup>26</sup> It has been difficult to classify Latinos due to the confusing categorization used over the years by the United States Census.<sup>27</sup> For example, as discussed later, in the 1980 United States Census, Mexican-Americans, Puerto Ricans, and other Latinos became homogenized into a "super" ethnic group: they were listed along with other national descent groups, and they were also in a separate category, sometimes as a "race," along with white, black, and other non-white.<sup>28</sup>

NEW SOCIAL AGENDA '9 (Pastora San Juan Cafferty & William C. McCreedy eds., 1985); see also U.S. BUREAU OF THE CENSUS, THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 1993, CURRENT POPULATION REPORTS 20-475 (1994).

25. MONTGOMERY, *supra* note 10, at 10-11. The Latino population is the fastest-growing minority population in the United States. Teresa A. Sullivan maintains that any conclusions about Hispanics must be drawn from comparisons within Hispanic groups and from comparisons from Hispanic groups, due to the unreliability of past data regarding Hispanics from the United States Census Bureau. Nevertheless she argues:

The Hispanic population increased from 4.5 percent of the U.S. population in 1970 to 6.4 percent in 1980. By 1980, Mexican-origin persons accounted for about 60 percent of the Hispanic population. Between 1977 and 1980, the estimated proportion of Hispanics of Mexican origin fluctuated between 58.1 and 60.6 percent. Puerto Rican origin accounted for 13.8 percent of Hispanics in 1980. There have been small declines in the estimated proportion of Puerto Ricans for every year since 1977, when the estimated proportion was 15.5 percent. The proportion of Cuban origin has fluctuated between 5.7 and 6.6 percent, with 6.3 percent estimated in 1980. Central or South American origin accounted for 7.7 percent of the Hispanic population in 1980, the same percentage as in 1977. "Other Spanish origin" has fluctuated between 11.4 and 12.7 percent since 1977; the 1980 estimate was 12.3 percent.

Sullivan, *supra* note 24, at 19.

26. Some scholars have noted the intra-Latino racial differences:

The term [Hispanic] fails to recognize the extremely rich ethnic and racial diversity of Latin Americans, for example, Argentines of Italian, German or French descent; Mexicans of Irish or Japanese ancestry; Cubans with Spanish, Lebanese, African or Chinese forebears; Peruvians of English, Russian-Jewish or Inca lineage; Venezuelans of Polish or Uruguayan stock; Brazilians of Korean or Greek heritage—the varieties go on and on. And, of course, there are those many Latin Americans who are entirely or partly of African and American Indian ancestry with some of the above thrown in.

Carl J. Mora, Letters to the Editor, *Americans of Hispanic Origin*, N.Y. TIMES, Feb. 25, 1985, at A16.

27. See *infra* notes 221-226 and accompanying text.

28. See *infra* notes 234-235 and accompanying text.

The third variable is the method of incorporation in United States society. Except for the recent Mexican immigrants, the Mexican-American and Puerto Rican presence in the United States resulted not from migration of people from Mexico to the United States, but from conquest.<sup>29</sup> By contrast, Cuban-Americans are immigrants which have migrated to the United States due to political upheaval and economic distress on the island of Cuba.

The fourth variable is geographic distinctiveness. Each of the three Latino subpopulations has been the dominant Latino group in a particular portion of the United States. Mexican-Americans live traditionally in the Southwest, and particularly in the border states of California, New Mexico, and Texas. Mainland Puerto Ricans live in largest numbers in the New York metropolitan areas, and Cuban-Americans, for the most part, live in Florida.<sup>30</sup> Each of these "Latino areas" are different economically, socially, and politically—and these differences are important in two ways: (1) understanding the special characteristics of each Latino subpopulation, and (2) dispelling the homogenization process.

B. *Los Confundidos: Who are We? (¿Quién Somos?)*

1. *Mexican-Americans: The Native Sons and Daughters*

I am Chicana  
 Waiting for the return  
 of la Malinche,  
 to negate her guilt,  
 and cleanse her flesh  
 of a confused Mexican wrath

---

29. Suzanne Oboler points out the importance of incorporation—especially in understanding each of the Latino subpopulations. She argues:

This diversity in itself raises the issue of the role of the national cultures, the racial and class differences, the customs and language of first-generation Latin American immigrants for understanding their relationship both to "being Hispanic" and to Chicanos and Puerto Ricans who are historical minorities in the United States. While Latinos' commonalities are often recognized in the U.S. context, the acknowledgment of their internal diversity includes examining the implications of the historical differences that shaped the experience of incorporation of the various national-origin groups encompassed by the term Hispanic.

SUZANNE OBOLER, *ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES XIV* (1995).

30. According to Teresa Sullivan, "[t]he Cuban-origin population is concentrated in Florida, with a secondary concentration in New York City and its New Jersey suburban area. Many of the 'other Spanish' are found in New Mexico and Colorado, where it is believed that they are 'Hispanos' (the descendants of Spanish colonists . . .). Sullivan, *supra* note 24, at 20.

which seeks reason  
 to the displaced power of Indian deities.  
 I am Chicana  
 Waiting for the coming of a Malinche  
 to sacrifice herself  
 on an Aztec altar  
 and Catholic cross  
 in redemption of all her forsaken daughters.<sup>31</sup>

As the poem above illustrates, Mexican-Americans have an ancient and proud ancestry, predominantly Native American, but with significant Spanish and African components. This racial, cultural and ethnic mosaic is trying to find its identity in light of another conquest. In the poem, Sylvia Gonzalez uses "la Malinche," a Mexican mythical figure often associated with the Aztec past, "mestizaje,"<sup>32</sup> and violence of the conquest.<sup>33</sup>

The history of Mexican-Americans is unlike that of any other minority group.<sup>34</sup> Mexican-Americans became a minority not by immigrating or being brought to this country involuntarily, but by conquest. It was conquest that set the stage for the large-scale immigration from Mexico in the early twentieth century.

By 1900 the basic Mexican settlements were well established in the American Southwest.<sup>35</sup> Peak immigration periods have been

31. Nancy Saporta Sternbach, "A Deep Racial Memory of Love": *The Chicana Feminism of Cherrie Moraga*, in *BREAKING BOUNDARIES: LATINA WRITINGS AND CRITICAL READINGS 14* (Asunción Horno-Delgado et al. eds., 1989) (quoting Sylvia Gonzalez, *I am Chicana*, in *THE THIRD WOMAN 422* (Dexter Fisher ed., 1980)).

32. "Metizaje" refers to the cross between two races. Although it is now used often in the Latino community, it was originally used exclusively in reference to the cross between Spaniards and Indians.

33. Nancy Saporta Sternbach notes:

In both literature and criticism, Malinche's mythical presence has affirmed the fact that neither Mexicans or Chicanos (although for different reasons in each case) have made their peace with her. When Chicana writers began their reassessment, almost all of them spoke in counterpoint to Octavio Paz' landmark essay, "Los hijos de la Malinche," calling themselves instead "las hijas de la Malinche."

Saporta Sternbach, *supra* note 31, at 52.

34. The Mexican history and present is plagued by illegal immigration. Thus, there are Mexicans who can trace their ancestry to the last century, and there are the newly arrived undocumented immigrants.

35. In the early 1900s the Mexican "barrios" were formed. Joan Moore and Harry Pachon explain:

In nearly every city where there would be a sizable urban Mexican population, its rudiments had already appeared. Mexicans tended to settle together in distinctively "Mexican" neighborhoods or barrios. But the origins of these barrios often were different. One typical town plan in the border states was the settlement around a traditionally Mexican plaza (central area).

JOAN MOORE & HARRY PACHON, *HISPANICS IN THE UNITED STATES 24* (1985).

1910-1930, 1942-1954, and 1965 to the present.<sup>36</sup> Between 1821 and 1991, approximately 3.3 million documented migrants entered the United States; since the 1920s somewhere between 6 and 9 million undocumented immigrants have also entered.<sup>37</sup>

The entry into the United States of low-wage undocumented Mexican labor has periodically met considerable public opposition. Although growing concern among nativist Anglo-Americans led to the passage of the 1965 Immigration Act, which included restrictions on legal Mexican immigration,<sup>38</sup> the United States economy de-

36. See generally Pastora San Juan Cafferty, *The "New" Immigration, in HISPANICS IN THE UNITED STATES: A NEW SOCIAL AGENDA*, supra note 24, at 35-36 (discussing patterns of immigration in the twentieth century). See also U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT 62-64 (1975); JULIAN SAMORA, *LOS MOJADOS: THE WETBACK STORY* 7-8 (1971); Oscar J. Martinez, *On the Size of the Chicano Population: New Estimates: 1850-1900*, 6 *AZTLÁN* 55-56 (1975). Immigrants can be divided into five major categories: (1) those with official visas ("legals"); (2) undocumented immigrants ("illegals"); (3) braceros (seasonal farm workers on contract); (4) commuters (those with official visas who live in Mexico but work in the United States); and (5) "border crossers" (those with short-term permits, many of whom become domestics).

37. See Martinez, supra note 36, at 44-46, 57; JOAN MOORE, *MEXICAN AMERICANS* 49-51 (2d ed. 1976).

38. Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1101, 1151 (1965). Growing concern over the presence of undocumented immigrants in the United States led to passage of the 1986 Immigration Reform and Control Act (IRCA). Its five provisions authorized: (1) legalization of undocumented immigrants residing in the U.S. continuously since 1982; (2) sanctions for employers who hire undocumented aliens; (3) reimbursement of governments for the added costs of legalization; (4) screening of welfare applicants for migration status; and (5) special programs to bring in agricultural laborers. In short, the law established penalties for employers who hire undocumented workers, as well as an identification system and an amnesty program for undocumented workers who resided in the United States for some time. Ironically, during the summer of 1987 the U.S. agricultural industry suffered a crippling shortage of seasonal workers—an unintentional consequence of IRCA. Fearing deportation under the new law, fewer Mexican workers crossed the border illegally, leaving U.S. crops to rot in the fields while confirming the industry's reliance on this illegal work force. Just over 3 million undocumented immigrants applied for legalization by the January 30, 1989, deadline; 1.7 million applications were ultimately accepted for adjustment to legal residence, representing approximately two-thirds of the estimated eligible population. Mexican immigrants made up three-fourths of those granted IRCA legalization. See Stephen Koepp, *Rotten Shame: Who Will Pick the Crops?*, TIME, June 22, 1987, at 49. See also SUSAN GONZÁLEZ BAKER, *THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT* (1990); UNITED STATES IMMIGRATION POLICY TOWARD MEXICO, 84-85; Susan González Baker & Frank Bean, *The Legalization Programs of the 1986 Immigration Reform and Control Act*, in *IN DEFENSE OF THE ALIEN* 3, 3-11 (Lydio F. Tomasi ed., 1990); Jacqueline Maria Hagan & Susan González Baker, *Implementing the U.S. Legalization Program: The Influences of Immigrant Communities and Local Agencies on Immigration Reform*, 27 *INT'L MIGRATION REV.* 514 (1993); Cheryl Anderson, *Immigration Bill Under Attack on Several Fronts*, AUSTIN AMERICAN-STATSMAN, Dec. 1, 1982, at C1. The black/white paradigm impeded the recognition of the Mexican-American population as a "minority." It was not until 1970 that the word "minority" expanded to include Mexican-Americans; before that time the tendency to think within the black/white paradigm of urban minorities as simply American blacks greatly affected public policy. See Joan W. Moore, *Minorities in the American Class System*, 110 *DAEDALUS* 275, 275-302 (1981).

pended heavily on undocumented immigrants.<sup>39</sup> As Pastora San Juan Cafferty notes, illegal immigrants are not solely Mexicans, "the others come from other countries, including Korea, Taiwan and the Phillipines. . . . [I]mmigration is perceived as Mexican immigration [because] of the emphasis placed on apprehending Mexican immigrants."<sup>40</sup>

During the 1960s and 1970s Mexican-American ethnic consciousness first emerged through the Chicano movement.<sup>41</sup> Many Mexican-Americans joined the new La Raza Unida Party (LRUP), which tried to achieve representation of all people by a local government that served the needs of individual communities as well as an end to poverty and injustice.<sup>42</sup> By the 1980s Mexican-Americans were identified no longer with the LRUP but rather with the State Democratic party. Yet, LRUP had brought about democratization of some southwestern communities, raised political consciousness of

39. See LEO R. CHÁVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* viii (1992).

40. Cafferty, *supra* note 36, at 40.

41. It is difficult to define the "Chicano movement" in the 1960s and 1970s. As Fred A. López III states:

The Chicano movement was a potent force in American society during the tumultuous decades of the Vietnam War, urban riots, the antiwar movement, and Watergate. One of several politically militant groups that began to challenge the hegemony of the ruling class in the 1960s and 1970s, the movement had several major components: César Chávez and the United Farm Workers (UFW) in California, Reies-López Tijerina's Alianza de Pueblos Libres (Alliance of Free Peoples) and the land-grants struggle in New Mexico, Rodolfo "Corky" González and the Cruzada (Crusade for Justice) in Colorado, and the electoral movement of José Angel Gutiérrez in South Texas. Out of this movement sprang hundreds of organizations whose purpose was to improve socioeconomic conditions for Mexican-American people.

Fred A. López III, *Reflections on the Chicano Movement*, 19 *LATIN AM. PERSP.* 79, 79 (Fall 1992).

42. As Fred A. López states:

The heterogeneous Chicano movement of the 1960s and 1970s was important to Mexican-Americans' struggle for political, economic, and social equality in American society. The record of success in these areas is mixed because of class, ideological, geographical, rural-urban, and age differences among Mexican-Americans. The four books under review [which analyze the Chicano movement and the LRUP] together represent a valuable contribution to our understanding of that era of political activism and confrontation with Anglo American society. . . . [they] do much to explain the problems of leadership, lack of coherent ideology, lack of effective organization, conflicting goals and scarcity of resources that afflicted the Chicano movement, but there are still some gaping holes in this documentation. The role of women in the movement cries out for further research, and to date there is not comprehensive study of Chicano political alienation. The combination of Chicano ethnic consciousness with class consciousness to give rise to a new social awareness might help explain the absence of a Chicano movement in the 1980s and its replacement by a new 'ethnic identity,' the Hispanic. Perhaps the least satisfying aspect of these works is the absence of a clear vision of the future for Chicanos in the 1990s.

*Id.* at 85

many Mexican-Americans, and prompted Mexican American political participation.<sup>43</sup>

## 2. *Mainland Puerto Ricans: The Undecided*

Born in the Bronx, *not* really jíbara  
*Not* really hablando bien  
 But yet, *not* Gringa either  
 Pero *ni* portorra, pero sí portorra too  
 Pero *ni* que what Am I?<sup>44</sup>

As the poem above illustrates, mainland Puerto Ricans' identity is one that is "neither here, nor there." Puerto Ricans' ability to travel back-and-forth between the island and the mainland has created a Latino subpopulation which is in search of a bicultural identity.

Puerto Rico was once part of the Spanish empire, but for nearly a century it has been a commonwealth of the United States.<sup>45</sup> After

43. LRUP's major successes occurred in Crystal City, a south Texas city mostly populated by poor Mexican-Americans. A cannery had come to that area in the 1940s, followed in the mid-1950s by the Teamsters' Union. The union gave workers job security and some political resources for electoral campaigns. During the 1960s LRUP became a leading political force in the area, and by 1970 Mexican-Americans had won control of the school board and city council. These new leaders hired more Mexican-American teachers, teacher aides, and administrators, started bilingual programs, and added Mexican-American history to the school curriculum. Mexican-Americans were hired or promoted to all levels of the city bureaucracy. Millions of dollars in federal aid poured in to support programs in health, housing, and urban renewal. See JOHN S. SHOCKLEY, *CHICANO REVOLT IN A TEXAS TOWN* 28-148, 162-77 (1974); Michael V. Miller & James D. Preston, *Vertical Ties and the Redistribution of Power in Crystal City*, 53 SOC. SCI. Q. 722, 772-84 (Mar. 1973).

44. Sandra María Esteves, *Not Either*, in *TROPICAL RAINS: A BILINGUAL DOWNPOUR* 26 (1984). The word "jíbara" means a Puerto Rican peasant or farmer. "Hablando bien" means speaking well. "Gringa" means Anglo-American; and "Portorra" is a slang word for mainland Puerto Rican. "Ni" means "not" in Spanish.

45. Borinquén, the original name for Puerto Rico, had a population of about 50,000 in 1493 when the Spanish reached the island. See MANUEL MALDONADO-DENIS, *PUERTO RICO, A SOCIO-HISTORIC INTERPRETATION* 13-19 (Elena Vialo trans., 1972). As Joe R. Feagin and Clairece Bocher Feagin explain, it was the Spanish imperialism that produced the various races and ethnic backgrounds in the Puerto Rican Population:

Spain used the native people (the Taino) as forced labor in mines and fields. Forced labor, disease, and violent suppression of rebellions caused a decline in the native population, so slaves were imported by the Spanish from Africa to fill the gap. The absence of women among the Spanish colonizers led to marriages between Spanish men and Native American or African women, producing a blended population of significant size. Over time the population included a growing number of free blacks, since Spanish law allowed slaves to purchase their freedom. By 1530 only 369 of Puerto Rico's 3,049 inhabitants were European-born Spaniards. During the nineteenth century immigrants and refugees from numerous countries, both European and Latin American, made their way to Puerto Rico. The census of 1827 found that the proportions of whites and people of color in Puerto Rico were almost equal. By the end of the century the island's population comprised thirty-four nationalities. Puerto

the Spanish-American War, Spain gave Puerto Rico to the United States under the Treaty of Paris in 1899.<sup>46</sup> Puerto Rico was particularly attractive to the United States for two reasons: (i) it was historically the richest coffee-producing island in the Caribbean, and (ii) its geographical location made it of strategic military importance.<sup>47</sup> In 1917, the Jones-Shafroth Act (called the Jones Act) gave Puerto Ricans United States citizenship and made them eligible for the military draft.<sup>48</sup>

Puerto Ricans made their way to the mainland, specifically New York, as early as the nineteenth century.<sup>49</sup> Mass migration began only after World War II, but then rapidly accelerated.<sup>50</sup> For exam-

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Ricans today are the product of many racial and ethnic streams.

JOE R. FEAGIN & CLARIECE BOCHER FEAGIN, *RACIAL AND ETHNIC RELATIONS* 336 (5th ed. 1996). Puerto Rico became a commonwealth in 1947. Although all Puerto Ricans are American citizens, Puerto Rico is not a state. Puerto Ricans send non-voting delegates to the United States Congress but cannot vote in United States federal elections. Today there is much debate over the political future of Puerto Rico—the factions for independence, statehood, or for a continuation of the current commonwealth status are always at odds. See Enrique Fernandez, *Through A Latin Lens, Puerto Rican Independence: Is It a Dream?*, NEWSDAY, Feb. 27, 1992, at 94. See also Daniel Adams, *Puerto Ricans Vote on Independence from U.S.*, INDEPENDENT, Dec. 9, 1991, at 14.

46. For a discussion of the Spanish-American War, see DAVID HEALY, *U.S. EXPANSIONISM: THE IMPERIALIST URGE IN THE 1890S* (1970).

47. See U.S. COMMISSION ON CIVIL RIGHTS, *PUERTO RICANS IN THE CONTINENTAL UNITED STATES: AN UNCERTAIN FUTURE* 11-12 (1976); Jorge Heine, *A People Apart*, 4 WILSON Q., 119, 119-23 (Spring 1980).

48. See KAL WAGENHEIM, *PUERTO RICO: A PROFILE* 69 (1970).

49. Until the 1930s Puerto Rico was ruled as an agricultural colony under various United States decrees. Through the 1920s and 1930s, the monopoly control of sugar cane plantations cut down the number of small farmers, the "jibaros." As a result, Puerto Rico lost its subsistence economy. Without wage labor, Puerto Rican migration to jobs on the mainland was inevitable. See Frank Bonilla & Ricardo Campos, *A Wealth of Poor: Puerto Ricans in the New Economic Order*, 110 DAEDALUS 133 (1981). Frank Bonilla and Ricardo Campos see the migration as an exchange of people for capital. In addition, they believe that the exchange process is still continuing in the series of federal efforts to "develop" Puerto Rico. According to Bonilla and Campos, these efforts are doomed to failure because the effect is always more poverty, forcing yet more people into migration. *Id.* at 152. See also Rita M. Maldonado, *Why Puerto Ricans Migrated to the United States in 1947-1973*, 99 MONTHLY LAB. REV. 7 (1976) (demonstrating that wage and unemployment rate differentials between the island and the mainland explain migration flows between 1947 and 1967, but in later years, return migration was motivated by additional noneconomic factors).

50. Some scholars believe that the reason for the Puerto Rican mass migration after World War II was due to the failure of Operation Bootstrap in Puerto Rico. Operation Bootstrap was designed by Puerto Rican Governor Luis Muñoz Marín to bring about economic development by attracting United States corporations to the island. The lure under Operation Bootstrap was a ten-year exemption from local taxation as well as over wages on the mainland. Although many United States corporations came, and gross domestic product tripled between 1950 and 1970, the tax exemptions left the burden of financing the infrastructure on the local population, resulting in a high personal income tax rate. Moreover, Operation Bootstrap's emphasis on industrial development, as opposed to agriculture, led to a loss of agricultural jobs and a need to import food. See Adalberto López, *The Puerto Rican Diaspora*, in *PUERTO RICANS: THEIR HISTORY, CULTURE AND SOCIETY* 313-343 (Adalberto Lopez ed., 1982). The opportunities offered Puerto Ricans were like those available for Mexican nationals. In the 1940s,

ple, in 1900, some 2,000 Puerto Ricans lived on the mainland; most of these in New York City. In the late 1940s, immigration quadrupled.<sup>51</sup> East Harlem became "Spanish Harlem" and closely identified with Puerto Ricans.<sup>52</sup> Jack Agueros describes the impact of the Puerto Rican mass migration on the mainland:

[World War II] ended and the heavy Puerto Rican migration began . . . . Into an ancient neighborhood came pouring four to five times more people than it had been designed to hold. Men who came running at the promise of jobs were jobless as the war ended. They were confused. They could not see the economic forces that ruled their lives as they drank beer on the corners, reassuring themselves of good times to come while they were hell-bent toward alcoholism. The sudden surge in numbers caused new resentments, and prejudice was intensified. Some were forced to live in cellars, and were then characterized as cave dwellers. Kids came who were confused by the new surroundings; their Puerto Ricanness forced us against a mirror asking: "If they are Puerto Ricans, what are we?" and thus they confused us. In our confusion we were sometimes pathetically reaching out, sometimes pathologically striking out . . . . Education collapsed. Every classroom had ten kids who spoke no English.<sup>53</sup>

Like the Mexicans and African-Americans, by the mid-1960s Puerto Ricans began to organize politically. The Puerto Rican Forum and *Aspira* began to address the problems confronting Puerto Ricans on the mainland.<sup>54</sup> Although Puerto Ricans have made some

Puerto Ricans started to work for industrial employers. In addition, Puerto Ricans were also hired as agricultural workers—noticeable groups of Puerto Ricans began settling in New Jersey, New York, Massachusetts, and Michigan. See Edwin Maldonado, *Contract Labor and the Origins of Puerto Rican Communities in the United States*, 13 INT'L MIGRATION REV. 103, 103-21 (1979). In New York City Puerto Ricans worked in the cigar and garment industries. All early records in New York City demonstrate that the Puerto Rican islanders worked at unskilled jobs. See VIRGINIA SÁNCHEZ-KORROL, *FROM COLONIA TO COMMUNITY: THE HISTORY OF PUERTO RICANS IN NEW YORK CITY* (1994).

51. See JOSEPH P. FITZPATRICK, *PUERTO RICAN AMERICANS* (1971). See also C. WRIGHT MILLS ET AL., *PUERTO RICAN JOURNEY* (1950); ELENA PADILLA, *UP FROM PUERTO RICO* (1958). Patricia Cayo Sexton provides a good view of Spanish Harlem in the 1960s. PATRICIA CAYO SEXTON, *SPANISH HARLEM* (1968).

52. See generally PADILLA, *supra* note 51.

53. Jack Agueros, *Halfway to Dick and Jane: A Puerto Rican Pilgrimage*, in *THE IMMIGRANT EXPERIENCE: THE ANGUISH OF BECOMING AMERICAN* 93 (Thomas C. Wheeler ed., 1971).

54. See Joseph P. Fitzpatrick, *Puerto Ricans*, in *HARVARD ENCYCLOPEDIA OF ETHNIC GROUPS* 866 (Stephan Thernstrom ed., 1980); FELIX M. PADILLA, *PUERTO RICAN CHICAGO* 54, 99-143 (1987). Other organizations include: Puerto Rican Legal Project, the Puerto Rican Legal Defense Fund, the League of Puerto Rican Women, the Puerto Rican Teachers Association, the Puerto Rican Forum, and the Puerto Rican Family Institute. The Puerto Rican Teachers Association has worked to increase representation of Puerto Ricans among teachers and principals and to expand bilingual programs. Puerto Ricans have been active in labor and union organizations on the mainland since the late 1800s. *Id.* There have also been more militant groups. Joe R. Feagin and



strides in the federal level,<sup>55</sup> the long-term effects of institutional discrimination are highly noticeable in state and city government employment, where Puerto Ricans are significantly underrepresented. Studies show that government services have historically been less accessible to Puerto Ricans, and job training and employment services have been scarce in Puerto Rican communities.<sup>56</sup>

In recent times, Puerto Ricans have been plagued by what some have called the "revolving door" migration.<sup>57</sup> This back-and-forth migration has evolved due to a series of recessions, either in the United States or Puerto Rico, deteriorating neighborhoods and poor living conditions on the mainland, combined with the ability to freely go back and forth due to their citizenship status. The flow of returning people is important for two reasons: (i) this "restlessness"<sup>58</sup> has produced a different type of identity for Puerto Ricans,

Clairece Bocher Feagin describe the actions of the Young Lords, a militant protest group patterned after the Black Panthers:

A New York group formed a Young Lords political party. In December 1969 these Young Lords occupied the First Spanish Methodist Church in New York City for eleven days and organized a day-care center, a breakfast program, and a clothing distribution program. They created a newspaper, *Palante* (Forward), and led a demonstration of two hundred Puerto Ricans protesting squalid conditions at a local hospital. The Young Lords, which had begun as a Chicago street gang, developed their own protest style. Children of poor immigrants, they articulated a thirteen-point program for a democratic-socialist society. They called for 'liberation and power in the hands of the people, not Puerto Rican exploiters.' At the peak of their influence, the Young Lords had chapters in twenty cities. Militant Puerto Rican groups such as the Young Lords were subject to police repression, including infiltration of their groups and prosecution of some leaders, sometimes in rigged trials. Other leaders were co-opted into government antipoverty programs. The Young Lords gradually disbanded in the early 1970s. In 1989 many former members celebrated the militancy of the group and the twentieth anniversary of its founding. Many former members are today influential Puerto Rican professionals and leaders in community organizations.

FEAGIN & FEAGIN, *supra* note 45, at 353.

55. Although Herman Badillo was the first elected member to the United States House of Representatives in 1972, Puerto Rican representation in 1992 tripled with the election of Jose Serrano (D-New York), Nydia Valezquez (D-New York) and Luis Gutierrez (D-Illinois). Information provided by the Midwest-Northeast Voter Registration Education Project.

56. See U.S. COMMISSION ON CIVIL RIGHTS, *PUERTO RICANS IN CALIFORNIA* 16 (1980).

57. See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 47, at 19-25; Pedro A. Rivera, *Angel and Aurea*, 4 WILSON Q. 146 (Spring 1980). See generally C. WRIGHT MILLS, CLARENCE SENIOR, & ROSE K. GOLDSSEN, *THE PUERTO RICAN JOURNEY* (1950); CLARA E. RODRIGUEZ, *PUERTO RICANS: BORN IN THE U.S.A.* 4-8, 28 (1989); Adalberto López, *The Puerto Rican Diaspora: A Survey*, in *PUERTO RICO AND PUERTO RICANS: STUDIES IN HISTORY AND SOCIETY* 316, 316-22 (Adalberto López & James Petras eds., 1974).

58. "Restlessness" has been characteristic of Caribbean islanders for many years. Returning Puerto Ricans are put into this broader context. See generally Juan Flores et al., *La Carreta Made a U-Turn: Puerto Rican Language and Culture in the United States*, 110 DAEDALUS 193 (1985). Several studies have focused on the history and development of the Puerto Rican community in New York. Among the most recent is

than that of Mexican-Americans and Cuban-Americans, an identity that is centered in Puerto Rico, and (ii) it has given Puerto Ricans a Latino ethnic consciousness that is stronger than that of other Latino subpopulations.<sup>59</sup>

### 3. *Cuban-Americans: Last to Come, Most to Gain*

SHE: . . . How about some steamed broccoli . . .

ELLA: . . . arroz . . .

SHE: . . . yogurt . . .

ELLA: . . . frijoles negros . . .

SHE: . . . bean sprouts . . .

ELLA: . . . Plátanos fritos . . .

SHE: . . . wheat germ . . .

ELLA: . . . ensalada de aguacate . . .

SHE: . . . raw carrots . . .

ELLA: . . . flan!

SHE: . . . Granola!

ELLA: . . . Tal vez un arroz con pollo, o un ajiaco!<sup>60</sup>

An excerpt from a Cuban play above captures the Latina alternating cultural words to illustrate that the characters function as ethnic stereotypes. The "She" character is the Anglo-American, while "Ella," the Cuban-American, is trying to recapture her Cuban roots with the use of typical Cuban foods.<sup>61</sup>

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MEMORIAS DE MERNARDO VEGA (César Andreu Iglesias ed., 1977); SÁNCHEZ-KORROL, *supra* note 50.

59. As Virginia Sánchez-Korrol states:

According to some of the early leaders of the Puerto Rican community, a sense of latinismo already existed among the migrants during the first decades of the migration. In part, this stemmed from an acute awareness of their historical place within the Ibero-American family.

Virginia Sánchez-Korrol, *Latinismo Among Early Puerto Rican Migrants in New York City: A Sociohistoric Interpretation*, in *THE HISPANIC EXPERIENCE IN THE UNITED STATES: CONTEMPORARY ISSUES AND PERSPECTIVES* 151, 157 (Edna Acosta-Belén & Barbara R. Sjostrom eds., 1988).

60. Dolores Prida, *Coser y cantar* (1981) (unpublished manuscript on file with author).

61. As Alberto Sandoval notes:

Ella, whose future in the U.S. remains vague unless she takes the "yellow brick road" to assimilation, assures a space for herself within the mental spaces of the past; but such displacement is not a reactionary nostalgia. Rather, Ella re-replaces her Latina identity at the axis of her historical present in the U.S., that is, at the crossroads of cultural frontiers. At this crux, the Anglo laws of assimilation collide with her Latina cultural survival instincts of disassociation, making her aware of the possibility of a terminal loss of Latino culture, memories, and past experiences. For this reason, Ella must re-construct a new subjectivity—a bilingual/bicultural self in constant making—who refuses to be decentered, discontinuous, displaced at the margin, but that is at the same time a body of differences, inconsistencies, gaps, and antinomies in the eyes of the Anglo culture. As a result of this collision, the Latina subject is constantly aware of experiencing two socio-cultural territories

Cuban-Americans are the third largest national origin group of Latinos. Like Puerto Rico, Cuba was acquired by the United States as a consequence of the Spanish-American War of 1898.<sup>62</sup> Unlike Puerto Rico, the United States intervention only lasted until 1902, when Cuba won its independence.<sup>63</sup> Between 1902 and 1959 Cuba floundered politically, since it had no experience with democracy. Although the political turmoil was at times severe,<sup>64</sup> the Cuban economy experienced tremendous growth during this period.<sup>65</sup> Un-

ject is constantly aware of experiencing two socio-cultural territories and living in two linguistic horizons.

Alberto Sandoval, *Dolores Prida's Coser y cantar: Mapping the Dialectics of Ethnic Identity and Assimilation*, in *BREAKING BOUNDARIES: LATINA WRITING AND CRITICAL READINGS 201*, 217 (Asunción Horno-Delgado et al. eds., 1989).

62. Most of the history of Cuba has been characterized by foreign domination. From 1511 to 1898, it was ruled by Spain. "The long period of Spanish domination played a major role in forming Cuban culture." THOMAS D. BOSWELL & JAMES R. CURTIS, *THE CUBAN-AMERICAN EXPERIENCE* 16 (1984). Thomas B. Boswell and James R. Curtis argue that Spanish domination set in place the circumstances for early Cuban migration to the United States:

The language, religion, economic institutions, and social structure of Spain were transferred to the island. Spanish law and policy kept the government highly centralized and, along with trade, in the hands of Spaniards. Virtually no industry developed. Sugar and, to a lesser extent, tobacco became the major cash crops. Society was highly stratified, with relatively few rich families and a large mass of poor people, many of whom lived as peasants in a predominantly rural environment. In short, it was not a life of equal opportunities for all individuals. Sixty years later a socialist revolution would occur that would seek to address some of these inequalities. Those who chose to migrate to the United States instead of suffering through the changes and dislocations created by communism would carry with them many of the social and cultural attributes that their parents and grandparents had acquired during the Spanish phase of Cuba's history.

*Id.*

63. *Id.*

64. Thomas D. Boswell and James K. Curtis describe the corruption of political leaders in Cuba:

Sadly, between 1902 and 1959 Cuban leadership was characterized by intermittent indifference and ineptitude, as well as almost continuous corruption. Obtaining a national political office almost always guaranteed wealth. In 1909, for instance, José Miguel Gómez entered the office of President as a poor man and left a millionaire. Mario Garcia Menocal was worth perhaps one million dollars when he entered the Presidency in 1913. He left office eight years later with a fortune estimated at \$40 million. The situation reached an intolerable level during the later states of the dictatorship of Fulgencio Batista, who dominated the political scene between 1933 and 1959. He was chief of staff of the army from 1934 to 1940 and in fact was in a stronger position than the President. In 1940 he was elected to the Presidency and served until 1944. In 1952 he again became President, but this time he did so through a coup d'etat. He legalized his position in 1954 when he was re-elected to the office, although he was the only candidate.

*Id.* at 17.

65. The United States market for Cuba's sugar caused a rapid expansion in the amount of land used for its production. American capital was used to construct new sugar mills and plantations. By the late 1950s sugar accounted for about 80 percent of Cuba's total exports. See ROBERT C. WEST & JOHN P. AUGELLI, *MIDDLE AMERICA: ITS LANDS AND PEOPLE* 135-139 (1976).

fortunately, the benefits derived from this economic growth were not equally distributed among the island's population, thus creating the perfect arena for the "Castro Revolution" in 1959.<sup>66</sup>

The migration of large numbers of Cubans to the United States occurred after Cuba's 1959 revolution.<sup>67</sup> Initially the victory of Fidel Castro, a young rebel leader, brought hope for social, economic, and political reforms. However, that hope began to dwindle with the enactment of land grants to tenant farmers, guaranteed compensation to small sugar growers and the nationalization of public utility companies.<sup>68</sup> These reforms were not in the interest of Cuba's business, industrial, and political elites. As Joe R. Feagin and Clairece Bocher Feagin argue:

Exaggerated views of the Cuban revolution's threat to U.S. business and political interests, suspicions that Castro was a Communist, and Castro's declarations that he would not tolerate manipulation of Cuba by the U.S. Government led to open U.S. hostility toward Cuba, a break in diplomatic relations between the two countries, and a U.S. policy of welcoming refugees from Cuba's "Communist oppression" to the "free world."<sup>69</sup>

From 1959 to the late 1970s there were three waves of immigration of Cubans to the United States. The 1959 to 1962 era of

66. Recent orthodoxy argues that Cuba was an economic and political vassal of the United States. Although Cuba had a robust economy at the time of Fidel Castro's takeover, it remained in an essentially underdeveloped condition. See JULIO LE RIVEREND, *HISTORIA ECONÓMICA DE CUBA* (La Havana: Editorial Nacional de Cuba, 1974); FRANCISCO LOPEZ SEGRERA, *CUBA: CAPITALISMO DEPENDIENTE Y SUB DESARROLLO, 1510-1959* (La Havana: Casa de las Americas, 1973). See generally, FELIX ROBERTO MASUD-PILOTO, *WITH OPEN ARMS: THE EVOLUTION OF CUBAN MIGRATION TO THE U.S.* (1988).

67. There were a number of Cubans who migrated to the United States in the nineteenth century. Most were from Cuba's middle and working classes, and although some settled in New York, Philadelphia, and Boston, most settled in south Florida. Most notably, a number of Afro-Cubans settled in Yber City and Tampace during the 1880s when cigar factories relocated there. See MASUD-PILOTO, *supra* note 66, at 7-11.

68. In describing the agrarian reforms, Thomas D. Boswell and James R. Curtis argue:

In May 1959, the Castro government implemented its First Agrarian Reform Law. At that time only 8 percent of the landowners controlled 70 percent of the cultivated land. About 40 percent of this was farmed by poor sharecroppers and 25 percent of the best sugar acreage was in foreign hands. The 1959 law placed a limit of about 1000 acres, with some expectations, on the amount of land that could be privately owned. It also created the National Institute of Agrarian Reform (Institución Nacional de Reforma Agraria-INRA) that was to become responsible for planning future agricultural development. Most of the land that was confiscated was consolidated into large state farms, modeled after those established in the Soviet Union. About 100,000 sharecroppers were given "vital minimum" plots of approximately 67 acres to farm, if they wanted to work on their own land instead of a state-operated farm. Although the law provided for some compensation to be paid to the former landowners, almost all of them left the country and never received any payment.

BOSWELL & CURTIS, *supra* note 62, at 20.

69. FEAGIN & FEAGIN, *supra* note 45 at 360.

Cuban immigration is often referred to as the wave of "Golden Exiles."<sup>70</sup> This refers to the belief that the vast majority were former members of the elite classes in Cuba. This concept is partly correct. The first wave of Cuban immigrants were Cuba's elite: former government officials, bankers, and industrialists who had done well under the previous dictatorship and feared Castro's reforms.<sup>71</sup> The second wave started in 1961, when large numbers of middle- and upper-income Cubans came to the United States. These exiles were middle-level professionals, managers, merchants, and over half of Cuba's doctors and teachers.<sup>72</sup> Both of these waves of Cubans consisted of white or light-skinned Cubans.

As with earlier Cuban immigrants, south Florida is where these exiles chose to settle. In their minds, south Florida, only 90 miles from Cuba, was the logical destination, since they were planning to go back to Cuba after the overthrow of Castro's regime.

In 1961, to provide for the immediate needs of the Cuban refugees, the Eisenhower Administration created the Cuban Refugee Emergency Center in Miami and allocated \$1 million in federal funds.<sup>73</sup> This aid was later expanded by the Kennedy Administration in the form of the Cuban Refugee Program that assisted refugees with resettlement, helped them locate employment, and provided for maintenance, health services, education and training programs.<sup>74</sup>

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70. The term "Golden Exiles" has remained part of the way in which Anglo-Americans perceive Cuban Americans. The refugees were overrepresented in the legal and white-collar professions and underrepresented in the primary occupations (such as agriculture and fishing) and in blue collar jobs. However, the refugees were also a highly diverse group. Virtually all occupations were represented, making it incorrect to think of all of them as having been elites in Cuba. In fact, less than 40 percent should be so considered. Nevertheless, when considered as a whole, the refugees for the 1959 to 1962 interval were not representative of the entire Cuban population. See BOSWELL & CURTIS, *supra* note 62, at 39.

71. See L. H. GANN & PETER J. DUIGNAN, *THE HISPANICS IN THE UNITED STATES: A HISTORY* 101 (1986).

72. More than 215,000 Cubans migrated to America between 1959 and 1962. Although both critics and defenders of the Cuban revolution agree that those who have left the island do not represent a cross section of the total population, it is incorrect to claim that those Cubans in exile came exclusively from the privileged sectors of the island. See RICHARD R. FAGAN, ET AL., *CUBANS IN EXILE: DISAFFECTION AND THE REVOLUTION* 16-17 (1968). A study conducted in 1963 determined some of the reasons why Cubans migrated to Miami between 1959 and 1962. Twenty percent of those questioned stated that imprisonment or fear of imprisonment was the most significant motivating factor in their decision to leave. Another 20 percent indicated harassment and persecution. Thirty-seven percent said they left Cuba because they generally disagreed with government activities. *Id.* at 90.

73. See MASUD-PILOTO, *supra* note 66, at 1-5.

74. This federal program was a major asset in helping Cuban refugees resettle in the United States. Cubans are the only large group of Latinos who have been granted political refugee status and on that basis have been able to qualify for federal financial aid. *Id.* at 83-87.

After what has been called the "missile crisis hiatus"<sup>75</sup> from 1962-65, a third stream of Cuban immigrants totaling more than 250,000 arrived between 1965 and the late 1970s.<sup>76</sup> Many relatives of those refugees already in the United States were allowed to leave from the Cuban port of Camarioca in 1965 aboard hundreds of boats arriving from Miami. This flotilla exodus was followed by an airlift agreement between the United States and Cuba,<sup>77</sup> which established the flights that became known as the "Freedom Flights."<sup>78</sup>

A fourth wave of Cuban immigrants arrived in 1980, in what is generally known as the "Mariel boatlift."<sup>79</sup> Popular images characterized the Mariel refugees as undesirables—poorer, less educated and mostly black<sup>80</sup> or mixed Cubans, with a large percentage being either criminal or mentally ill.<sup>81</sup> This group included some who left

75. The missile crisis and United States military blockade of Cuba in October of 1962 brought an abrupt halt to all legal transportation between the two countries. See BOSWELL & CURTIS, *supra* note 62, at 47.

76. See Silvia Pedraza-Bailey, *Cuba's Exiles*, 19 INT'L MIGRATION REV. 4, 15-17 (1985); Michael G. Wenk, *Adjustment and Assimilation: The Cuban Refugee Experience*, 3 INT'L MIGRATION REV. 38, 39 (1968).

77. Air transportation was initiated on December 1, 1965, and continued until April 6, 1973. Normally 2 flights a day, 5 days per week, were operated between Miami and Havana, carrying 3000 to 4000 persons per month. It has been estimated that 297,318 persons arrived during the seven-year airlift. In addition, 4993 came by boat during the 2-month boatlift from Camarioca. A little over 302,000 Cubans migrated directly to the United States between October 10, 1965, and April 6, 1973. A few also continued to travel indirectly from Cuba via third countries, such as Mexico and Spain, to Miami and New York. See ALEJANDRO PORTES & ROBERT BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* 32-45 (1985).

78. The flights were also known as the "Family Reunification Flights."

79. See *Wake From Mariel's Boats Still Washes South Florida*, MIAMI HERALD, Apr. 19, 1981, at 16A; Joyce Wadler, *Violent Mariel Refugees Plague New York, Too*, MIAMI HERALD, Dec. 13, 1981, at 1G.

80. A large percentage of the Marielitos were black. See generally Alejandro Portes & Alex Stepick, *Unwelcome Immigrants: The Labor Market Experiences of 1980 (Mariel) Cuban and Haitian Refugees in South Florida*, 50 AM. SOC. REV. 493 (1985).

81. The arrival of the "Marielitos" in Miami caused a great deal of intra-Cuban American community conflict. Thomas Boswell and James Curtis argue:

An opinion poll conducted by The Miami Herald in May 1980 determined that 68 percent of the non-Latin whites and 57 percent of the blacks surveyed felt that the Mariel refugees have had a largely negative impact on Dade County. In addition to the perception that the Mariel sealift was being used by Castro to empty his jails and mental institutions, there are at least four other reasons why the "Marielitos" were not welcomed upon their arrival in Florida. First, the suddenness and massive size of the influx intensified problems in helping them settle. Many who did not have relatives or friends to help them adjust were temporarily housed in military camps in Florida, Arkansas, Pennsylvania, and Wisconsin. One estimate is that it has cost the United States Government close to \$1 billion to provide for the Mariel exiles, including the budgets for the Navy and Coast Guard operations that took place during the flotilla. A second reason for refugees from Mariel not being welcomed is that the United States' economy in 1980 was experiencing a recession, accompanied by inflation. In Dade County it has been estimated that the unemployment rate jumped from about 5 percent to 13 percent, primarily due to the Mariel influx. Also, the apartment vacancy rate was reduced to less than 1

voluntarily and others who were forced to leave because they were considered undesirable by the Cuban government.

The last wave of Cuban immigrants arrived in the summer of 1994.<sup>82</sup> Known as the "Cuban boat people," they arrived by boats or rafts after the Cuban government lifted its ban on emigration in 1994.<sup>83</sup> Reversing its three-decade-old policy, the United States stopped admitting Cubans and sent them instead to camps at Guantanamo Bay Naval Station.<sup>84</sup> In a negotiated agreement, the United States agreed to increase to 20,000 the annual numbers of visas granted to Cubans, while the Cuban government agreed to ban mass exodus of Cubans to the United States.<sup>85</sup>

## II. THE CONFLATION: AN OVERVIEW

This Article examines the conflation of Latino's race and nationality in United States society and law. The conflationary concepts of nationality and race are not only central in understanding the status of Latinos in American society and law, but also the larger question of race in these two arenas.<sup>86</sup> Michael Omi and Howard

percent, creating an acute housing shortage and high rents.

BOSWELL & CURTIS, *supra* note 62, at 54. See also FEAGIN & FEAGIN, *supra* note 45.

82. See Tim Gold, *U.S.-Cuban Accord Sets Off Surge of New Refugees*, N.Y. TIMES, Sept. 11, 1994, at 1.

83. *Id.*

84. *Id.*

85. *Id.*

86. Race is an important component of American society. T. Alexander Aleinikoff argues:

To say that race makes a difference means more than simply identifying material disadvantages facing people of color in contemporary America. It also recognizes that race may have an influence on how members of society understand their worlds and each other, and how such understandings may serve to perpetuate racial inequalities in our society.

T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1066 (1991).

Race and its implications are at the core of American society and law. See generally ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* 28-29 (1972) (observing that "race affects class formation and class influences racial dynamics in ways that have not yet been adequately investigated"). See also ANATOMY OF RACISM (David Theo Goldberg ed., 1990); HOUSTON A. BAKER, JR., *AFRO-AMERICAN POETICS: REVISIONS OF HARLEM AND THE BLACK AESTHETIC* (1988); HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY, AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY* (1984); *THE BOUNDS OF RACE: PERSPECTIVES ON HEGEMONY AND RESISTANCE* (Dominick LaCapra ed., 1991); HENRY LOUIS GATES, JR., *FIGURES IN BLACK: WORDS, SIGNS AND THE "RACIAL" SELF* (1987); HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* (1992); HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* (1988); *THE NATURE AND CONTEXT OF MINORITY LITERATURE* (Abdul R. JanMohamed & David Lloyd eds., 1990); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986); "RACE," *WRITING, AND DIFFERENCE* (Henry Louis Gates, Jr. ed., 1986); Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT. REV. 95 (1990); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23

Winant suggest that race, together with class and gender, has always been at the very center of America's social and political history.<sup>87</sup> As T. Alexander Aleinikoff notes, "[i]n our society, race has not been a benign mode of classification."<sup>88</sup> The designation of one's race has had a double function, both defining social categories and assigning characteristics to members of those categories.<sup>89</sup>

The historic fusion and confusion of these two concepts has allowed "white America,"<sup>90</sup> as the dominant culture, to develop racist

HARV. C.R.-C.L. REV. 295 (1988); Joyce A. Joyce, *The Black Canon: Reconstructing Black American Literary Criticism*, 18 NEW LITERARY HIST. 335 (1987); Joyce A. Joyce, *Who the Cap Fit: Unconsciousness and Unconscionableness in the Criticism of Houston A. Baker, Jr., and Henry Louis Gates, Jr.*, 18 NEW LITERARY HIST. 371 (1987); Cornel West, *Minority Discourse and the Pitfalls of Canon Formation*, 1 YALE J. CRITICISM 193 (1987). The impact on race on law is no exception. See THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1949-1970 (R. Bardolph ed., 1970); A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR (1978) (describing in painful detail the extent to which the law itself created the mores of racial repression); Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5 (1976).

87. See OMI & WINANT, *supra* note 86, at 5. For an excellent recent critique of the race and ethnicity debates, see E. SAN JUAN JR., RACIAL FORMATIONS/CRITICAL TRANSFORMATIONS: ARTICULATIONS OF POWER IN ETHNIC AND RACIAL STUDIES IN THE UNITED STATES (1987).

88. See Aleinikoff, *supra* note 86, at 1069.

89. *Id.*

90. I use the term "white America" somewhat reluctantly. In this article the term refers to more than just skin color, it refers to dominant values, ideologies, and power configurations that benefit whites and subordinate others. Embodied in the term "white America" is the term "white Supremacy." Frances Ansley would characterize my definition of "white American" in the context of what she calls the "race model." She observes:

[W]hat I call the 'race model,' characterizes white supremacy as an evil standing on its own base. In this view there is no reason to look beyond the system of racial hierarchy itself to understand its well-springs and strength. White supremacy produces material and psychological benefits for whites, while extracting a heavy material and psychological price from blacks. White supremacy is concretely in the interests of all white people. It assure them greater resources, a wider range of personal choice, more power, and more self-esteem than they would have it the were (1) forced to share the above with people of color, and (2) deprived of the subjective sensation of superiority they enjoy as a result of the societal presence of subordinate non-white others.

Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1035 (1989) (citations omitted). The definition of "white America" within the rubric of the race model forces us to understand the "physiology" of racism. See Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317-18 (1987). Richard Delgado has also advocated the need for more psychoanalytical framework by civil rights scholars. Richard Delgado notes, "I was unable to locate any CLS articles or books on the psychology of racism." Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 11 HARV. C.R.-C.L. L. REV. 301, 315 (1987). Again Frances Lee Ansley contends:

By "white supremacy" I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white sub-



stereotypes<sup>91</sup> about Latinos, while depriving them of their "pre-migratory cultural heritage."<sup>92</sup> While Latinos' commonalities are

ordination are daily reenacted across a broad array of institutions and social settings.

A few years ago I probably would have called this system "institutionalized racism." Today, however, in an era of so-called "color blindness," when "racism" can mean the disfavoring of a white person for the most transitory and isolated purpose, I believe white supremacy to be the more helpful and accurate term. While not denying that a system of black supremacy is conceivable in the abstract, the term "white supremacy" reminds us that the institutional racism of our place and epoch (our planet?) has been a racism of white over black. To my mind, any jurisprudence or politics of racial justice that fails to recognize and incorporate this overwhelming reality has missed the boat.

Ansley, *supra* note 90, at 1024 n.129. Similarly, "[w]hite Americans, by sheer force of numbers, determine how things will be for others as long as they act as white people who are somehow different from others who are not." DOROTHY NEWMAN ET AL., *PROTEST, POLITICS AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS, 1940-75* 5 (1978). See Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1 (1991).

91. Stereotypes determine our perception and judgment of others. Stereotypes are social constructs—shaped by social, economic, political and historical antecedents, and they are used in order to justify the subjugation, exploitation and even elimination of others. Social science research suggests that stereotypes serve as powerful mechanisms, supplying explanations for events even when evidence supporting nonstereotypical explanations exists. See Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 PERSONALITY & SOC. PSYCHOL. 267, 267-82 (1985). Individuals interpret situations and actions differently when the race of the actors varies. Galen V. Bodenhausen and Robert S. Wyer, Jr., noted:

The studies reported in this article were stimulated by our desire to determine more precisely how stereotypes influence information processing and decision making. In two experiments, participants received a "case file" of information about a target person who had engaged in a transgression, and they were asked to decide what punishment should be administered. In some cases, a transgression-related cultural stereotype of the target was activated before other information about him was presented. We addressed two basic questions: First, what implications is a stereotype likely to have for the interpretation of a transgression and why it occurred, and under what conditions is a stereotype likely to be applied? Second, what influence does a stereotype-based impression of a person's behavior have on the processing of other information about the individual?

*Id.* at 267-68. In discussing African American stereotypes, Charles Lawrence draws upon psychoanalysis, anthropology, and cognitive psychology to show the power of tacit power stereotypes that perpetuate racism. See Lawrence, *supra* note 90, at 317.

Catherine McKinnon claims that the use of the term "stereotype" negates the reality of the oppression of women. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 118-19 (1987). See generally, DAVID L. HAMILTON & TINA K. TROLIER, *STEREOTYPES AND STEREOTYPING: AN OVERVIEW OF THE COGNITIVE APPROACH*, IN *PREJUDICE, DISCRIMINATION, AND RACISM* 127 (John F. Dovidio & Samuel L. Gaertner eds., 1986), and studies cited therein.

92. The term "pre-migratory cultural heritage" referring to Latin American origin groups in the United States, was coined by B.E. Aguirre and Rogelio Saenz. See B.E. Aguirre & Rogelio Saenz, *A Futuristic Assessment of Latino Ethnic Identity*, 19 LATINO STUD. J. 20 (1991). According to B.E. Aguirre and Rogelio Saenz:

These heritages are born from common Iberian parentage as well as from distinct national experiences. It is seldom recognized that while united by language, the groups are separated by national experience.

emphasized by the stereotypes,<sup>93</sup> their internal diversity shaped by historical differences and diverse experiences of incorporation are rarely acknowledged. Moreover, class experiences are homogenized, and linguistic, racial and ethnic groups within the different nationalities are neglected.

The conflation and its impact on both American society and law is disturbing because the Latino community is exceedingly heterogeneous in terms of its national origin,<sup>94</sup> social class,<sup>95</sup> socioeconomic status,<sup>96</sup> and method of incorporation in the United States.<sup>97</sup> Latinos

*Id.*

93. The dominant group (white Americans) constructs categories of thought that appear objective and divorced from race, but which operate in conjunction with racial stereotypes to rationalize white domination. *See generally* LYNN D. TROST, *EASTERN METAPHYSICAL DUALISM AS AN ELEMENT IN RACISM* 49 (John L. Hodge et al. eds., 1975) (observing the "dualistic nature" of racist beliefs, cultural Bases of Racism and Group Oppression).

94. Most members of the Spanish-origin population—at least 60 percent—are of Mexican origin, divided between native-born Americans and immigrants; another 14 percent come from Puerto Rico and are U.S. citizens by birth, whether they were born in the island or the mainland; the third group in size is Cubans, who represent about 5 percent and are, overwhelmingly, recent immigrants coming after the consolidation of a communist regime in their country. In addition to these major groups, there are sizable contingents of Dominicans, Colombians, Salvadorans, Guatemalans, and other Central and South Americans, with their own distinct histories, characteristics, and patterns of adaptation. *See generally* RODOLFO O. DE LA GARZA, ET AL., *LATINO VOICES: MEXICAN, PUERTO RICAN, AND CUBAN PERSPECTIVES ON AMERICAN POLITICS* (1992).

95. According to Martha E. Giménez:

The common experience of racism and discrimination among less privileged Latin Americans and members of U.S. minorities might become a strong basis for political alliances. Less privileged Latin American immigrants of non-European ancestry (e.g., displaced Central American peasants) and those who may be better off but come with no English-language skills tend to gravitate toward ethnic enclaves in which, classified as generic Hispanics by the authorities, the mass media, and the society in general, they confront problems and develop needs similar to those experienced by U.S. historically exploited minorities of Mexican and Puerto Rican descent. In fact, poor working-class Central and South American immigrants, legal and illegal, increase the ranks of the Hispanic poor, thus strengthening "majority" stereotypes about their permanent economic inferiority and cultural backwardness.

Martha E. Giménez, *U.S. Ethnic Politics: Implications for Latin Americans*, 19 *LATIN AM. PERSP.* 7, 15 (1992).

96. The following table compares 1992 family income levels and poverty rates for mainland U.S. Latinos of Mexican, Puerto Rican, and Cuban origin with those of the European-origin population:

	Puerto Rican Origin	Mexican Origin	Cuban Origin	European Origin
Median family income	\$20,301	\$23,714	\$31,015	\$40,420
Families with incomes of \$50,000 or more	14.6%	14.9%	27.0%	37.5%
Percentage of families below poverty level	32.5%	26.4%	15.4%	7.3%
Percentage of children less than 18 years old below pov- erty line	52.1%	39.5%	22.3%	13.2%

are also racially heterogeneous. A substantial portion of Latinos are descendants of indigenous Amerindian<sup>98</sup> peoples, European colonizers, black slaves brought from Africa, and immigrants from other parts of the world.<sup>99</sup> Thus, the conflation has managed to reduce Latinos to an American racialized group,<sup>100</sup> regardless of their historical or racial identities.

Notice that on family income and poverty measures, mainland Puerto Ricans ranked lowest among the three Latino groups, followed by Mexican-Americans. Cuban Americans were closer to the European American population on these measures than they were to Mexican-Americans or mainland Puerto Ricans. In 1992 the median income for Mexican-origin families was only 59 percent that of European-origin families. The median income for Mexican-American men (\$13,622) was less than 55 percent that of European American men (\$24,994); the median income for Mexican-American women (\$10,098) was 71 percent that of European American women (\$14,241) but only 40 percent that of European American men. One must also keep in mind that Mexican-American families have more workers than European American families. In 1993 Mexican-American families were almost four times as likely to be in poverty as European American families, and almost 40 percent of all Mexican-American children below eighteen years of age were living below the poverty line. Mexican-Americans make up the majority of the population in Texas's lower Rio Grande Valley. The 37 percent poverty rate in the border town of Laredo, Texas is typical of the area. Mexican-Americans, who comprise 90 percent of Laredo's population, endure not only the absence of material goods but a daily devaluation of their self esteem and worth. Poverty "is systematically perpetuated by political and social institutions which justify and maintain a social order premised on inequality." See FEAGIN & FEAGIN, *supra* note 45, at 306.

97. By the term "method of incorporation in the United States" I am referring to the distinct and diverse methods each of the Latin origin groups became associated with in the United States. With respect to Mexican-Americans and Puerto Ricans, their descendants of U.S. conquest were colonized by the United States at the turn of the century—not to be confused with recent immigrant arrivals from Mexico, Central or South America, or the Spanish-speaking Caribbean nations.

98. The term "Amerindian" refers to early American indigenous populations. As Mark A. Burkholder and Lyman L. Johnson observed:

Although the Aztecs and Incas are the civilizations best known during the age of conquest, they constituted only a minority of the total Amerindian population and resided in geographic areas that together comprised only a small portion of Latin America's landscape. Araucanians, Arawaks, Caribs, Chibchas, Chichimecas, Ge, Guaraní, Mapuche, Otamí, Maya, Quibaya, Taino, Tepanecs, and Tupi joined a host of other peoples and linguistic groups that inhabited the Americas; together they formed a human mosaic whose diverse characteristics greatly influenced the ways in which colonial Latin America developed.

MARK A. BURKHOLDER & LYMAN L. JOHNSON, *COLONIAL LATIN AMERICA* 5 (1994).

99. See Sullivan, *supra* note 24, at 9. According to Teresa Sullivan:

One variable is race. The original Spanish colonists—and many of their descendants—are Caucasians phenotypically indistinguishable from the English colonists. Some of the Hispanic population, especially if that term is defined by Spanish surname, are American Indians. Others are Black, the descendants of African slaves brought to the Caribbean islands or (in small numbers) to Mexico. The descendants of these groups are the Hispanics, some of whom consider themselves to be a separate "brown" race.

*Id.*

100. I use the term "American racialized group" to describe racialization in an American framework. In America, race is conceived of as a dichotomous concept in

To introduce the evolution of this conflation, this overview provides the context in which the conflation flourished and continues to flourish, and gives a summary of the conflation as it relates to the three largest Latin American origin groups in the United States—Mexican-Americans, Puerto Ricans, and Cuban-Americans—individually, and collectively, under the label of “Hispanics.”<sup>101</sup> Finally, the overview concludes with a general consideration of the conflation’s significance to legal doctrine, culture, and theory.

### A. *The Conflation in Context*

The context in which the conflation has operated and continues to operate has had a great impact on the success of the conflation in American law and society. As Martha Minow and Elizabeth Spelman assert:

It is not the familiar competition between the universal and the particular that motivates our interest in context. Like others concerned with the failures of abstract, universal principles to resolve problems, we emphasize ‘context’ in order to expose how apparently neutral and universal rules in effect burden or exclude any-

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which individuals are socially constructed and legally defined as being either white or non-white. Elizabeth Martínez explains with respect to racial issues, America has a “Black-white framework”:

Three of the reasons for the Black-white framework of racial issues seem obvious: numbers, geography, and history. African-Americans have long been the largest population of color in the U.S.; only recently has this begun to change. Also, African-Americans have long been found in sizable numbers in most of the United States, including major cities. On the other hand, Latinos—to focus on this group—are found primarily in the Southwest plus parts of the Northwest and Midwest and they have been (wrongly) perceived as a primarily rural people—therefore of less note.

Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, 20 SOCIAL JUST. 26 (1992).

101. The “Hispanic” label was created by the federal Office of Management and Budget in the 1970s. Some critics of the label contend that it has resulted in the creation of a “new minority group”:

Because ethnic enumeration is an important political issue in the context of affirmative action and other laws intended to remedy the effects of historical economic and political discrimination, minority leaders have always been concerned with means to improve the Census Bureau’s ability to identify and count minority populations. That the Hispanic label automatically produces greater numbers than identification by historical and political criteria (e.g., Puerto Rican, Mexican-American, Chicano, etc.) led Mexican-American, Puerto Rican, and Cuban leaders to lobby for its adoption . . . . The inclusion in the census of a self-identification question that forces Mexican-Americans, Puerto Ricans, Cubans, Central and South Americans, and Spaniards to identify themselves as “persons of Spanish/Hispanic origin” has resulted in the political and statistical construction of a new minority “group,” a group whose origins can be traced to statistical manipulation and the pursuit of immediate political advantage rather than to historical foundations.

Giménez, *supra* note 95, at 10. For a detailed critique of the label, see Martha E. Giménez, “*Latino/Hispanic—Who Needs the Name? The Case Against Standardized Terminology*,” 19 INT’L J. HEALTH SERVICES 557 (1989).

one who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written. It is the particular particularities associated with legacies of power and oppression that we mean to highlight by the interest in context. In so doing, we aim to question the distinction between abstraction and context, while also paying attention to the risk that calling our concerns 'contextual' in fact may bury them and remove their political implications. Yet, we are equally interested in the charge that an emphasis on context undermines capacities for political, moral, and legal judgments.<sup>102</sup>

The creation and evolution of the conflation in American law and society must be examined in the sphere of "neutral" and "universal" standards, formulated in nineteenth century America and perfected in the twentieth century.<sup>103</sup> These standards according to which the foreign Others were and continue to be normalized, though considered to be neutral and universal, are, in fact, culturally and experientially specific standards of the dominant group.<sup>104</sup>

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102. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1990). Martha Minow and Elizabeth V. Spelman distinguish their meaning of "context" from the common usage of the word:

In contrast, we mean to signal with 'context' a readiness, indeed an eagerness, to recognize patterns of differences that have been used historically to distinguish among people, among places, and among problems. This focus distinguishes our interest from what was probably a more common usage of 'context' by the early pragmatists. Dewey, for example, stressed individual uniqueness when he looked to context; he maintained that perhaps the highest calling of our reason and intelligence was figuring out what to do when confronting moral problems.

*Id.* at 1600.

103. I am using the terms "neutral" and "universal" not to refer to legal rules or standards, but to social and ideological ones. It is my belief that social and ideological standards, although perceived to the "neutral" and "universal," when applied to people of color have the same exclusionary impact as legal ones. Critical Race theorists have discussed the shortcomings of "neutral" standards in the context of jurisprudence. They contend that traditional jurisprudence is neither neutral nor legitimate and impose not justice, but power. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

104. The dominant group does not always act intentionally. An important part of the privilege of a dominant group is the ability to see itself as "normal" and "neutral." T. Alexander Aleinikoff argues:

Dominant groups may have neither the inclination nor the ability to be fully aware of their domination. Dominant groups generally do not consider themselves to be oppressive, particularly in a society in which tolerance for diversity is valued, and they can provide descriptions of themselves and the disadvantaged that explain inequality as either justified or natural. To the extent that these descriptions effectively absolve dominant groups of responsibility for inequality, and therefore from bearing any of the costs of ameliorating inequality, there is little motivation for the dominant culture to question them.

Aleinikoff, *supra* note 86, at 1084. See generally Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 151 (discussing that in discrimination cases, race and sex are significant only as they disadvantage victims; privilege is implicit and not perceived). MacKinnon eloquently describes this with regard to gender:

Moreover, the application of these standards allows the dominant group to simultaneously universalize itself and particularize the foreign Other.<sup>105</sup> One such standard in nineteenth century America was the standard of expansion, which has been justified by some historians as necessary for the spreading of democracy. In the case of the Mexican-American War in 1847, Justin H. Smith wrote:

At the beginning of her independent existence, our people felt earnestly and enthusiastically anxious to maintain cordial relations with our sister republic, and many crossed the line of absurd sentimentality in the cause. Friction was inevitable, however. The Americans were direct, positive, brusque, angular and pushing; and they would not understand their neighbors in the south. The Mexicans were equally unable to fathom our goodwill, sincerity, patriotism, resoluteness and courage; and certain features of their character and national condition made it far from easy to get on with them.<sup>106</sup>

Rodolfo Acuña argues that Smith's justification for the Mexican-American War is that "Mexicans cannot understand or appreciate the merits of a free society . . . domestic war or repression, is

The male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality. It does not comprehend its own perspectivity, does not recognize what it sees as a subject like itself, or that the way it apprehends its world is a form of its subjugation and presupposes it.

CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 121-122 (1989).

The dominant group invents stories that create a shared reality in which their domination seems fair and neutral. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) ("The stories . . . told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.")

105. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 163-168 (1990). Generally, the dominant group seeks to preserve its sovereignty by creating and enforcing definitions of social reality that maintain the current social boundaries, excluding others from the privileges they enjoy. See Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 61 (1987) (discussing feminist recognition of the "power of naming" which takes "a male as the reference point and treat[s] women as . . . 'different,' [and] 'deviant'"); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 179 (1987) (discussing feminist recognition "that knowledge and identity are forged in social relationships"); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1282 (1985) (discussing the representation of social hierarchies through a language "which establishes the categories through which the relation with the social other is mediated"); cf. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398 (explaining how accent is a social construction that enforces social boundaries).

106. 2 JUSTIN H. SMITH, THE WAR WITH MEXICO 310 (1963). Justin H. Smith received a Pulitzer prize in history for his two-volume book, which essentially blamed the Mexican-American War on Mexico, since they were unable to appreciate the benefits of democracy.

justified by the same kind of rhetoric that justifies international aggression."<sup>107</sup>

The justification for the Mexican-American War in 1847 was rooted in America's self-definition as a nation. The United States population in the mid-1840s, which was comprised of 17 million people of European extraction and 3 million slaves, was much larger than Mexico's 7 million, of which 4 million were Indian and 3 million mestizo and European.<sup>108</sup>

America's self-definition as a nation cannot be separated from its past and present social relations of domination and power.<sup>109</sup> One account of the Mexican-American War expressly makes the connection between domination, power, and race. As Arnoldo De León notes referring to Stephen F. Austin, an advocate of the war:

To Austin, redemption could come by 'whitening' Texas—or, phrased differently, by making it a cultural and racial copy of the United States. In August 1835, he wrote that the best interests of the nation required 'that Texas should be effectually, and fully, Americanized—that is—settled by a population that will harmonize with their neighbors on the *East*, in language, political prici-

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107. RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 15 (3d ed. 1988). Recently political theorists justify the war by explaining it as the victory of one system of production and land tenure over a less progressive one. See SEYMOUR V. CONNOR & ODIE B. FAULK, NORTH AMERICA DIVIDED: THE MEXICAN WAR 1846-1848 (1971); RAÚL A. FERNÁNDEZ, THE UNITED STATES-MEXICO BORDER: A POLITICO-ECONOMIC PROFILE 6-7 (1977).

108. See ACUÑA, *supra* note 107, at 12.

109. See JOHN BRENKMAN, CULTURE AND DOMINATION 4-7 (1987). Sometimes race gets lost in these conversations. Hence Bell Hooks observes:

Anyone witnessing the current cultural and academic focus on race has to note the new way race is being talked about, as though it were in no way linked to cultural practices that reinforce and perpetuate racism, creating a gap between attitudes and actions. There is even a new terminology to signal the shift in direction: the buzz words are difference, the Other, hegemony, ethnography. It's not that these words were not always around, but that they now are in style. Words like Other and difference are taking the place of commonly known words deemed uncool or too simplistic, words like oppression, exploitation, and domination. Black and white in some circles are becoming definite no-nos, perpetuating what some folks see as stale and meaningless binary oppositions. Separated from a political and historical context, ethnicity is being reconstituted as the new frontier, accessible to all, no passes or permits necessary, where attention can now be focused on the productions of a privileged . . . discourse in which race becomes synonymous with culture. There would be no need, however, for any unruly radical black folks to raise critical objections to the phenomenon if all this passionate focus on race were not so neatly divorced from a recognition of racism, of the continuing domination of blacks by whites, and (to use some of those out-of-date, uncool terms) of the continued suffering and pain in black life.

BELL HOOKS, YEARNING: RACE, GENDER & CULTURAL POLITICS 51-52 (1990). I think that an antisubjugation principle that opposes racism, sexism, homophobia, and economic subjugation is necessarily linked to multiculturalism and the value of diversity. These values of rights and social justice are not simply closely associated, but rather they are necessarily of benefit to each other.

ples, common origin, sympathy, and even interest.' It was well known, he continued, that his object had always been to fill up Texas with a North American population. 'I wish a great immigration from Kentucky, Tennessee, *every where*, passports or no passports, *any how*. For fourteen years I have had a hard time of it, but nothing shall daunt my courage or abate my exertions to complete the main object of my labors—to *Americanize Texas*. This fall, and winter, will fix our fate—a great immigration will settle the question.'<sup>110</sup>

The American national identity<sup>111</sup> had ideological strains which were rooted in the nature of the events that brought the nation to birth. The separation of the colonies from Great Britain by the Declaration of Independence and the American Revolution created the need for a national consciousness—"the spiritual counterpart of the political entity that had come into being."<sup>112</sup> This national consciousness did not include Blacks or Native Americans, and in time other racial and cultural groups were regarded as falling outside the

110. ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900* 3 (1983).

111. I use the term "American identity" interchangeably with "American nationality" and "American character." As William Peterson, Michael Novak and Philip Gleason assert:

It is true that these are vague expressions, and that distinctions could be introduced among them, but their imprecision accurately reflects the indeterminacy of the phenomena to which they refer, and in common usage these expressions are more or less synonymous.

WILLIAM PETERSON, ET AL., *CONCEPTS OF ETHNICITY* 57-58 (1980). With respect to the term identity they write:

The term 'identity' has become indispensable in the discussion of ethnic affairs. Yet it was hardly used at all until the 1950s. The father of the concept, Erik H. Erikson, remarked on its novelty in his widely read book *Childhood and Society* (1950): 'We begin to conceptualize matters of identity at the very time in history when they become a problem. For we do so in a country which attempts to make a super-identity out of all the identities imported by its constituent immigrants.' In an autobiographical account published 20 years later, Erikson, himself an immigrant, quoted this passage and added that the terms 'identity' and 'identity crisis' seemed to grow out of 'the experience of emigration, immigration, and Americanization.'

The relationship between ethnicity and American identity—super-identity, as Erikson called it—is complex and elusive. The difficulty of talking about it is compounded because the terms we must use are inescapably multivalent and can be understood in many different senses. For this reason, it is desirable to be as explicit as possible about the terms at the outset.

*Id.* at 57.

112. *Id.* at 58. The ethnic diversity of the American population was secondary: The revolutionary generation was quite cognizant of the fact that nation building required not just fashioning viable political institutions but also nurturing an American nationality in keeping with the values, philosophy, and outlook embodied in the Constitution and the laws. The fact that the American people were of diverse ethnic strains was not overlooked in discussions of nationality, but because of the nature of the events that brought the nation to birth, the American identity was conceived primarily in abstract ideological terms. Ethnic considerations were subsidiary.

*Id.* at 58-59.



spectrum of American nationality. The tried and proven lessons of this history reveal that the pragmatic exaltation of the nationalist agenda over the Latin origin groups was easily taken at face value, thus perpetuating exclusions.

The American national identity came to be "imagined" as white, Protestant and Anglo-Saxon, despite the presence of not only non-Anglo-Saxon and Catholic Europeans, but also of Native Americans and other classes, races, and national origins.<sup>113</sup> Benedict Anderson proposes that a nation is an "imagined political community" because "the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."<sup>114</sup> Anderson argues that "nationality . . . nation-ness, as well as nationalism, are cultural artifacts of a particular kind."<sup>115</sup> Anderson maintains that once created, these cultural artifacts become modular, "capable of being transplanted, with varying degrees of self-consciousness, to a great variety of social terrains, to merge and be merged with a correspondingly wide variety of political and ideological constellations."<sup>116</sup>

As we track the evolution of America's identity, Anderson's theme of an "imagined community" is pertinent. In the nineteenth century, "cultural artifacts" embodying the meaning of America's nationality were molded to define people of Latin American origin in the United States as "homogeneously 'foreign' to the image of 'being American,' . . . regardless of the time and mode of their incorporation into the United States or their subsequent status as citizens of this nation."<sup>117</sup> Particularly in the years following the Civil War, when America grappled with the legacy of slavery and tried to formulate imagined boundaries of inclusion and exclusion in the national community, people of Latin American origin became regarded as "foreign Others."<sup>118</sup> The dominant cultural understanding and

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113. See Oboler, *supra* note 4, at 19.

114. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (rev. ed. 1991). Benedict Anderson further asserts:

[I]t is imagined as a community, because regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings.

*Id.* at 7.

115. *Id.* at 4.

116. *Id.*

117. See OBOLER, *supra* note 29, at 18.

118. According to Suzanne Oboler:

Indeed, insofar as the understanding of the U.S. national identity is invariably defined and shaped in relation to those conceived as "foreign Others" in the hemisphere, it is perhaps not surprising that in a period in which an increasing number of new nations were being established in the Americas, the contacts

experience of the nation universalized itself as the inevitable self-definition—marking the culture of the marginal as the “foreign Other,” either to be excluded or “normalized.”<sup>119</sup>

This perception of “foreign Others” with respect to Latin Americans was the product of international and domestic forces in the nineteenth century.<sup>120</sup> Internationally, the dominance/subordination process of the nineteenth century was justified under the call for expansion. Domestically, the boundaries of exclusion were institutionalized through the formal conflation of race and nationality.

Currently, important segments of our society now recognize multicultural diversity positively.<sup>121</sup> Nevertheless, the actual em-

between this country and the newly formed Latin American national populations contributed toward creating representations in the United States of a unified image of the “American national community.” Thus, I argue that the nation’s identity was forged in the nineteenth century partially through the creation of racialized perceptions that homogenized Latin America’s populations and that in turn set the context for the later emergence of the label Hispanic in the twentieth century. Based on the development of ideologies that justified the expansionist actions of the United States in Latin America and the Caribbean, these perceptions reflected a peculiar fusion of the social status, race, and nationality of “foreign Others” in the hemisphere.

*Id.* The concept of “otherness” was not a new one to the Latin origin groups. Spain had utilized a Spanish grammar text as the colonial pretext for the assimilation of otherness and others. In 1492, Antonio de Nebrija wrote a book on the Castilian dialect, *GRAMÁTICA DE LA LENGUA CASTELLANA* (Ignacio González-Umbera ed., Oxford 1926) (1492), which was billed as the “‘companion of the Empire,’ an appropriate grammatical endorsement of Spain’s ethnic assertion, religious and racial bigotry, as well as the ultimate ‘civilized’ weapon for political expansionism among the illiterate . . . .” Imperial grammarians established a test of literacy for Hispanic citizenship, which, if successfully passed, allegedly provided official entry into the Hispanic ‘Text of Otherness,’ a grammatical contract of servitude.

119. Generally there have been two types of political responses of “white Americans” to “foreign Others”: assimilation and pluralism. The assimilation response attempts to transform the foreign Others into some version of the dominant group, by requiring the minority to learn the language of the dominant group, to follow the cultural practices of the dominant group, and generally to adjust its social practices and rituals to conform to those of the dominant group. The second political response holds that differences are to be celebrated rather than feared. Michael Walzer contends that “[t]he practical meaning of ethnic pluralism . . . is still being hammered out, in the various arenas of political and social life”. Michael Walzer, *Pluralism in Political Perspective*, in *THE POLITICS OF ETHNICITY* 13 (1982).

For a good discussion on pluralism and diversity, see generally LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE* (1990); LAW AND THE ORDER OF CULTURE (Robert Post ed., 1991); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); “RACE,” WRITING, AND DIFFERENCE, *supra* note 86..

120. See OBOLER, *supra* note 29, at 19.

121. However, Arthur M. Schlesinger, Jr. asserts that multicultural orientation is that of a “cult . . . [that] exaggerates differences, intensifies resentments and antagonisms, drives ever deeper the awful wedges between race and nationalities. The end game is self-pity and self-ghettoization.” ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 102 (1992).

bodiment of that diversity in the American national identity has yet to be realized. In both society and law, Latinos are still perceived as racialized "foreign Others" and have yet to receive the social justice and equitable distribution of power, privileges, and resources.

### 1. *The Conflation: Parts of the Whole*

The conflation of nationality and race in the case of Latin American origin populations in the United States results in "Latin American origin" being considered as a "race" instead of a nationality. This is particularly significant with respect to Mexican-Americans and Puerto Ricans because their nationality has been "American" since the nineteenth century.<sup>122</sup>

Indeed, when discussing the subject of Latin American origin groups in the United States, a distinction must be made between the "colonized"<sup>123</sup> Latin American origin communities and the "migrated" Latin American origin communities. The first category comprises of Mexican-Americans, as well as Puerto Ricans who live on the mainland. The second category reflects the waves of migration that, for political or economic reasons, have brought to the United States Cubans, Central Americans, and South Americans.

The conflation between nationality and race can be traced to the three largest Latin American origin groups: Mexican-Americans, Puerto Ricans and Cuban-Americans. This is the case although each of these groups differ sharply in historical experience, socioeconomic status, and identity.<sup>124</sup> Thus, this Article will trace the conflation as it pertains to Mexican Americans, Puerto Ricans, and Cuban Americans.

Although the end result is the same, the evolution of the conflation in each Latino origin group is distinguished by its distinct historical and cultural experiences and unique set of geographically varied ecological adaptations. Thus, the evolution of the conflation is rooted in their colonial past. The United States victories in the Mexican American War and the Spanish American War brought both Mexicans and Puerto Ricans, respectively, into the domain of

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122. See *supra* notes 45 & 94 and accompanying text.

123. The term "native Hispanic" has also been used to refer to Mexican-Americans and Puerto Ricans.

124. There are a number of studies documenting extensive socioeconomic and demographic differentiation among persons of Mexican, Puerto Rican, Cuban, and other Spanish/Hispanic national origin. See A. J. JAFFE ET AL., *THE CHANGING DEMOGRAPHY OF SPANISH AMERICANS* (1980); MARTA TIENDA ET AL., *HISPANIC ORIGIN WORKERS IN THE U.S. LABOR MARKET: A COMPARATIVE ANALYSIS OF EMPLOYMENT OUTCOMES AND EARNINGS* (1981); Cary Davis et al., *U.S. Hispanics: Changing the Face of America*, 38 *POPULATION BULL.* 1, 1-43 (1983); Candace Nelson & Marta Tienda, *The Structuring of Hispanic Ethnicity: Historical and Contemporary Perspectives*, 8 *ETHNIC & RACIAL STUD.* 49, 49-74 (1985).

the United States.<sup>125</sup> Mexicans living in the newly acquired United States territory and Puerto Ricans, were designated as Americans by the Treaty of Guadalupe Hidalgo (1848),<sup>126</sup> and the Treaty of Paris (1898),<sup>127</sup> respectively. In contrast, Cubans have been largely incorporated into United States society as refugees fleeing Communism since Fidel Castro took power in 1959.

## 2. *The Conflation Institutionalized: The Sums of All Parts*

The conflation became institutionalized in the 1970s with the creation of the term "Hispanic" by the federal Office of Management and Budget (OMB).<sup>128</sup> The operational definition of the term "Hispanic" was: "A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."<sup>129</sup> Thus, the term "Hispanic" combines colonized natives and their offspring, foreigners and political refugees under one ethnic umbrella. Even though the operational definition provides that Hispanics may be of any race, the concept and its usage have racial connotations. For example, a New York Times article that discussed the results of the 1990 census reported a profound change in the racial composition of the United States—with almost a quarter of Americans having African, Asian, Hispanic or Native American ancestry.<sup>130</sup>

The term or label "Hispanic" has stimulated and provoked quite a conversation. Martha E. Giménez asserts:

The label deprives all Latin Americans of their national identities, which, though they have been used to develop racist stereotypes, are less likely to create the presumption of racial distinction. In my view, the fact that the heterogeneity of the Hispanic population is generally not taken into account, contributes to its assuming a racelike character in social, scientific and everyday discourse that strengthens the development of racist stereotypes.<sup>131</sup>

Many of these critics have suggested that the term "Latino" best describes the Latin American origin populations in the United States.<sup>132</sup>

The label Hispanic was further institutionalized by the U.S. Bureau of Census in 1980 and 1990. The "Hispanic" label fully formalizes the conflation of Latinos' race and nationality. The label

125. See *supra* notes 46 & 106-107 and accompanying text.

126. See Felicity Barringer, *Census Shows Profound Change in Racial Makeup of the Nation*, N.Y. TIMES, Mar. 11, 1991, at A1.

127. See Giménez, *supra* note 95, at 7-17.

128. See *infra* notes 231-32.

129. See *infra* notes 235-40.

130. See *infra* notes 235-45.

131. See Giménez *supra* note 95, at 15.

132. See *supra*, note 95 and accompanying text.

imputes on Latinos a contrived Hispanic "race," while minoritizing them in the process. The label serves to accomplish on a formal level, what the conflationary stereotypes accomplish on an informal, thereby creating a misleading and racist characterization of Latinos. Since the label does not identify a "race," then the heterogeneous population cannot be understood without necessarily falling into stereotyping.<sup>133</sup>

### B. *The Conflation: Concepts and Definitions*

My point of departure is that nationality, or as one might prefer to put it in view of that word's multiple significations, nation-ness, as well as nationalism, are cultural artifacts of a particular kind. To understand them properly we need to consider carefully how they have come into historical being, in what ways their meanings have changed over time, and why, today, they command such profound emotional legitimacy.

— Benedict Anderson

In my life the chief fact has been race—not so much scientific race, as that deep conviction of myriads of men that congenital differences among the main masses of human beings absolutely condition the individual destiny of every member of a group.

— W.E.B. Du Bois

Nationality and race are central constructs which have molded the place of Latinos in United States society and law since the nineteenth century. As suggested by Benedict Anderson and W.E.B. Du Bois, the histories and meanings of both of these constructs<sup>134</sup> are nonfixed, fluid and situational. That is, human interaction has been the source and continued influence for the evolution of both constructs.

#### 1. *Nationality*

In this Article, nationality has two meanings. On one hand, it refers to an individual's country of birth or origin. This meaning of nationality is similar to the legal concept of "national origin."<sup>135</sup> The other meaning of nationality is socially constructed.<sup>136</sup> As Alfred Cobban contends, "[nationality is] variable and malleable."<sup>137</sup>

133. See Gimenez, *supra* note 95, at 7-17.

134. I use the term "constructs" to emphasize the nonexistence of some fixed meaning for "race" and "nationality." The meanings of these two terms have been filtered through the different perceptions of reality.

135. See *infra* note 27-80.

136. See *infra* note 280 and accompanying text.

137. Quoted in HAROLD R. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND*

In the nineteenth century, "American nationality" came to be imagined as white, Protestant, and Anglo-Saxon, thus negating the existence of Native Americans, African-Americans, Asians, Caribbeans, and Latin Americans of varying classes, races, and national origins.<sup>138</sup> This image of "American nationality" is still part of the dominant culture today. As Suzanne Oboler argues, by the twentieth century "regardless of citizenship status, non-white European racial minorities born in the United States could continue to be conceived in the popular mind as outside of the 'boundaries' of the 'American' community."<sup>139</sup>

The conflation of Latinos' race and nationality coupled with the American "imagined community" served to exclude Latinos from the "boundaries" of American community and construct a meaning of "nationality" with respect to Latinos.<sup>140</sup> Even when Mexicans and Puerto Ricans were granted United States citizenship,<sup>141</sup> they were not included in the imagined community, instead they were racially perceived as "foreign Others."<sup>142</sup> Thus, "nationality" with respect to Latinos continues to be confused with racial categorization, purporting to identify a racially distinct group, instead of a country or place of origin.

## 2. Race

In order to understand the conflation, it is important to define "race." The term "race" has been defined and debated in the United States in a bipolar manner, with a fixed, concrete definition of race on one end of the spectrum,<sup>143</sup> and as an ideological con-

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POLITICAL CHANGE 182 (1975).

138. Many scholars believe that both Indians (Native Americans) and African Americans were not inclined to adopt the standards of civilizations accepted by other Americans. Oscar Handlin argues:

They refused to fall into settled ways of life; they rejected the learning of books; and they were slow to find the faith toward which the missionaries urged them. Contact with the whites seemed only to deprive the Indians of their primitive virtues. A dismaying series of reports to the Massachusetts Historical Society in the 1790's described the degeneracy of many tribes as they succumbed to the settlers' influence. Vice, intemperance, and disease were the products of such associations. In the face of this evidence, the belief that the red men would ultimately share the nationality of the whites was difficult to maintain.

OSCAR HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 34-35 (1957).

139. OBOLER, *supra* note 29, at 19.

140. *Id.*

141. *Id.*

142. *Id.* at 32-34.

143. This fixed and concrete notion of race is usually referred to as "biological race." By biological race, I mean the idea that there is a genetic and physical basis for categorizing people into different races based on their possession of certain physical traits. Ian F. Haney López argues that:

The idea that there exist three races, and that these races are "Caucasoid,"

struct on the other.<sup>144</sup> Jayne Chong-Soon Lee asserts that, “[h]istorically, the terrain of race has shifted between definitions of (1) race as biological characteristics, historical commonality, or essential identity, and (2) race as the erroneous categorization of people, or the false attribution of traits to people.”<sup>145</sup> Lee argues that both of these definitions “locate race as an attribute within people rather than as a complex set of relations between people.”<sup>146</sup> Moreover, these definitions fail to take into account how race is defined not by its inherent meaning but by the social contexts through which it is constructed.<sup>147</sup>

Race is socially constructed.<sup>148</sup> These social contexts connote some sort of human interaction or manipulation as the foundation for

“Negroid,” and “Mongoloid,” is rooted in the European imagination of the Middle Ages, which encompassed only Europe, Africa, and the Near East. . . . The peoples of the American continents, the Indian subcontinent, East Asia, Southeast Asia, and Oceania—living outside the imagination of Europe and Count Gobineau—are excluded from the three major races. . . .

Ian F. Haney López, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1, 13 (1994). For further criticism of the biological race theory, see Kwame Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in “RACE,” WRITING, AND DIFFERENCE, *supra* note 86, at 21, 36. Appiah states “[t]he truth is that there are no races: there is nothing in the world that can do all we ask ‘race’ to do for us. . . . The evil that is done is done by the concept and by easy—yet impossible—assumptions as to its application.” *Id.* See also Mastoshi Nei & Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1 (1982).

144. Michael Omi and Howard Winant argue that there is a “temptation . . . to imagine race as a mere illusion, a purely ideological construct which some ideal non-racist social order would eliminate.” OMI & WINANT, *supra* note 87, at 54. Henry Louis Gates, Jr. states “that ‘races’, put simply, do not exist, and that to claim that they do, for whatever misguided reason, is to stand on dangerous ground.” Henry Louis Gates, Jr., *Talkin’ that Talk*, in “RACE,” WRITING, AND DIFFERENCE, *supra* note 86, at 402-03. Gates clearly rejects the existence of biological races and writes that “[r]ace, as a meaningful criterion within the biological sciences has long been recognized to be a fiction.” Henry Louis Gates, Jr., *Writing “Race” and the Difference it Makes*, in LOOSE CANONS 43, 48 (1992). However, despite Appiah’s citation, Gates’s position on whether races exist as a social phenomenon is less clear.

145. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 751 (1994).

146. *Id.* The key component of the process termed “racial formation” is human interaction or manipulation, as opposed to biological forces. Thus, “[t]he processes of racial formation we encounter today, the racial projects large and small which structure U.S. society in so many ways, are merely the present-day outcomes of a complex historical evolution.” OMI & WINANT, *supra* note 86, at 61.

147. A great number of works have been written generally on the constructed nature of human society. For an important work in this area, see PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966). See also PAUL ATKINSON, *THE ETHNOGRAPHIC IMAGINATION: TEXTUAL CONSTRUCTIONS OF REALITY* (1990) (discussing the construction of sociological texts).

148. The notion that race is socially constructed means that we must examine how racial constructs are developed and have evolved. See MICHEL FOUCAULT, *POWER/KNOWLEDGE* (Colin Gordon ed., 1980); HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* (2d ed.

racial categorization. Michael Omi and Howard Winant argue that we should stop thinking of race "as, an *essence*, as something fixed, concrete and objective."<sup>149</sup> They suggest that we instead think of "race as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."<sup>150</sup> They label this phenomena "racial formation" or "the process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings."<sup>151</sup>

This Article will illustrate the formation of the Latino "race" by examining the conflation of nationality and race in connection with Latin American origin populations in the United States.

### 3. *Other Definitions*

This Article will use several terms consistently to describe cultural groups in American society, beginning with "Indigenous American" or "American Indian." These are umbrella terms that

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1983). The social construction of race does not occur in a vacuum. See also Michael Banton, *The Idiom of Race: A Critique of Presentism*, in RESEARCH IN RACE AND ETHNIC RELATIONS 21 (Cora Bagley Marret & Cheryl Leggon eds., 1980). Deborah Waire Post argues that "[t]he centrality of a socially-constructed source of identity like gender, race, or ethnicity cannot be separated from culture or politics." Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136, 139 (1990-91). See generally, Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT. REV. 95 (1990); Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101 (1991).

149. OMI & WINANT, *supra* note 86, at 54.

150. *Id.* at 55. Omi and Winant argue that:

With this in mind, let us propose a definition: race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies. Although the concept of race invokes biologically based human characteristics (so-called 'phenotypes'), selection of these particular human features for purposes of racial signification is always and necessarily a social and historical process. In contrast to the other major distinction of this type, that of gender, there is no biological basis for distinguishing among human groups along the lines of race. Indeed, the categories employed to differentiate among human groups along racial lines reveal themselves, upon serious examination, to be at best imprecise, and at worst completely arbitrary.

*Id.*

151. *Id.* at 61. There are recent sociological works which have also explored the notion of race as a social process. See Ellen K. Coughlin, *Sociologists Examine the Complexities of Racial and Ethnic Identity in America*, CHRON. HIGHER EDUC., Mar. 24, 1993, at A7 (citing the following works as examples of this new trend: RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* (1990); STEPHEN CORNELL, *THE RETURN OF THE NATIVE AMERICAN INDIAN POLITICAL RESURGENCE* (1988); YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1992); SUSAN OLZAK, *THE DYNAMICS OF ETHNIC COMPETITION AND CONFLICT* (1992); OMI & WINANT, *supra* note 86; FELIX M. PADILLA, *LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO* (1985); MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* (1990)).



capture many different cultural groups, the members of whom often prefer to be identified by their nation, people, or tribe rather than generically as an "Indian." Unlike other superclassifications, "American Indian" captures a collection of groups that have something essential in common: recognition by the federal government as sovereign entities. I avoid the misleading term "Native American," which defines non-Indians born in North America as aliens to this land.

I use "Black" or "African-American" interchangeably to reflect that both terms remain current in that community. I capitalize these terms to reflect that they describe a cultural group rather than a mass of people with only a physical feature in common.

I will use "Anglo-American" as a capitalized term because in the Southwest this term is used to describe a group considered one cultural community. I leave "white" uncapitalized because I believe that the term "white" does not describe any cultural subgroup. The terms "Anglo" and "white" capture the difference between an "Anglo" community that consists of persons who see themselves as the mainstream American society, and many "white" groups, possibly including Mormons, Russian-Americans, Jews, or Greek-Americans, who may remain culturally separate from the Anglo mainstream, but not racially subordinated.

I use "Asian/Pacific Islander" only to describe the collection of groups lumped together under that label.

### III. DE-CONFLATING RACE AND NATIONALITY IN UNITED STATES SOCIETY

The conflation of race and nationality in connection with Latin American origin groups emerged in nineteenth century America. Some Latino scholars believe that the manner in which nationality and race were fused in the treatment of Mexican Americans, Puerto Ricans, and Cubans is best exemplified in the expansionist policies and ideologies of the nineteenth century. In 1823, the Monroe Doctrine announced to the world that "the Americas were no longer open for colonization or conquest; however, it did not say anything about that limitation applying to the United States."<sup>152</sup> Although the Doctrine's declaration was initially an economic one, rather than political, the United States used the Doctrine as the rationale for hemispheric conquest. Victor Valenzuela argues that, "[b]y the end of the nineteenth century, the Monroe Doctrine was used freely by the United States to seize, to control or to intervene openly in the

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152. See ACUÑA, *supra* note 107, at 14.

affairs of Latin American countries.”<sup>153</sup> As Suzanne Oboler concludes:

Thus the Monroe Doctrine had in effect early on begun to establish a homogeneous approach to relations between the United States and Latin American nations and was to have far-reaching implications in forging a public American identity in relation to the other emerging nations in the hemisphere.<sup>154</sup>

The conflation was further fueled by the development of the ideology of the nation's “Manifest Destiny,”<sup>155</sup> which substantiated the nation's rationale for hemispheric conquest. The term, which had its roots in Puritan ideas,<sup>156</sup> effectively declared the superiority

153. See Victor M. Valenzuela, *The Monroe Doctrine, in ANTI-UNITED STATES SENTIMENT IN LATIN AMERICAN LITERATURE*, 11 (1982). The Monroe Doctrine declared that the entire hemisphere was in the United States sphere of influence, and that the principle of non-intervention by European powers applied to all former colonies of all European powers, not just those of Spain.

154. See OBOLER, *supra* note 29, at 33.

155. The term “Manifest Destiny” was originally coined in 1845 by John O’Sullivan, then editor of the *Democratic Review*. See OBOLER, *supra* note 29, at 34. The ideology quickly spread, and became President James K. Polk’s rationale for not only the Mexican-American War but also for the annexation of more than half of Mexico’s territory. Polk’s war message of May 11, 1846, stated:

The strong desire to establish peace with Mexico on liberal and honorable terms, and the readiness of this Government to regulate and adjust our boundary and other causes of difference with that power on such fair and equitable principles as would lead to permanent relations of the most friendly nature, induced me in September last to seek reopening of diplomatic relations between the two countries.

As war exists, and notwithstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon by every consideration of duty and patriotism to vindicate with decision the honor, the rights, and the interests of our country.

See ACUÑA, *supra* note 107, at 14 (quoting *THE WAR WITH MEXICO: WHY DID IT HAPPEN?* 3, 6 (Armin Rappaport ed., 1964)). The ideology of the nation’s Manifest Destiny was widely used by journalists and historians to spread the justification of the Mexican-American War and expansion. “Away, away with all these cobweb tissues of rights of discovery, exploitation, settlement, contiguity, etc. . . . [The American claim] is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us.” RAMÓN A. GUTIÉRREZ, *WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500-1846* 339-340 (1991) (quoting FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY* 31-32 (1963)). See generally REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981).

156. According to Rodolfo Acuña:

Manifest Destiny had its roots in Puritan ideas, which continue to influence Anglo-American thought to this day. According to the Puritan ethic, salvation is determined by God. The establishment of the City of God on earth is not only the duty of those chosen people predestined for salvation but is also the proof of their state of grace. Anglo-Americans believed that God had made them custodians of democracy and that they had a mission—that is, that they were predestined to spread its principles. As the young nation survived its infancy, established its power in the defeat of the British in the War of 1812,

of the white Anglo-Americans. As Rudolfo Acuña states: “[t]heir mission, their destiny made manifest, was to spread the principles of democracy and Christianity to the unfortunates of the hemispheres.<sup>157</sup> Thus, the racial connotations of the Manifest Destiny-based rationale for the Mexican-American War<sup>158</sup> and the subsequent annexation of the Mexican territory—highlighting the superiority of Anglo-Americans and the inferiority of the “mongrel” Mexicans—began to establish a national identity where the conquered race was relegated to a lower level than that of the conquering race. Moreover, the national identification of Latin Americans was supplanted by a racial one.<sup>159</sup>

The examples of the conflation in nineteenth century America demonstrate the extent to which the expansionist policies and ideologies of the era forged the fusion of race and nationality. Mexican-Americans, Puerto Ricans, and later Cubans were saddled with the inferior homogeneous identity of Latin Americans created during mid-nineteenth century.

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expanded westward, and enjoyed both commercial and industrial success, its sense of mission heightened. Many citizens believed that God had destined them to own and occupy all of the land from ocean to ocean and pole to pole. See ACUÑA, *supra* note 107, at 13.

157. *Id.*

158. Ronald Takaki, for example, summarizes the nationalist and racist justifications for the Mexican-American War put forth by the editor of the Southern Quarterly Review in the editor's discussion of the significance of the “conquest of California”:

The Mexican-American War had clarified the national purpose, [the editor] declared. . . . United States troops had chastised arrogant and ‘fraudulent’ Mexicans. . . . ‘There are some nations that have a doom upon them. . . . The nation that makes no onward progress . . . that wastes its treasures wantonly—that cherishes not its resources—such a nation will burn out . . . will become the easy prey of the more adventurous enemy.’

RONALD T. TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 161 (1979) (quoting *The Conquest of California, the case of Lieut. Col. Fremont*, 15 S. Q. REV. 410, 413-14 (1849)). See also SMITH, *supra* note 106, at 310.

159. See HORSMAN, *supra* note 155, at 229-71.

A. *The Conflation in the Nineteenth Century: The Roots of Constructed Hispanic Homogenization*

1. *From Natives to "Cholos," "Greasers" and Mustachioed Banditos: Early Portrayals of Mexican-Americans*

a. *Californianos/as: The Mexicans of California*

The conflation of Mexican-American nationality and race was constructed in mid-nineteenth century America.<sup>160</sup> In the early 1800s, people in the United States ascribed to Mexicans their nationality and, separate from that, races. For example, a Mexican national was considered Mexican and might also be white, Indian, Black, or Asian.<sup>161</sup> By the 1830s and 1840s, the conflation of Mexi-

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160. Although the scope of this Article is the conflation in American law and society, it is important to note that there are evidences of the conflation in the fifteenth century—during Spain's colonization of Latin and South America. Specifically in Spanish print there was effort to unify the new conquered colonies under the concept of "Hispanic race." As José Piedra contends: The concept of Hispanic "race" grew as a myth in print, rarely believed but mostly accepted as the unifying principle for the dissemination of Hispanidad. JOSÉ PIEDRA, 18 NEW LITERARY HIST. 303, 307-308 (1987). As a matter of fact, to this day, the conflation has been institutionalized in the celebration of Hispanic unity among Spanish-Americans as Día de la Raza ("Day of the Race") on the date of Columbus's first landing. For an important historiographical essay on Mexican-Americans, see Juan Gómez-Quiñones & Luis L. Arroyo, *On the State of Chicano History: Observations on its Development, Interpretations and Theory, 1970-1974*, 7 WESTERN HIST. Q. 155-185 (1976). For a general survey of Chicano history see ACUÑA, *supra* note 107. For a discussion of the economic motives behind the Mexican-American War see GLENN W. PRICE, ORIGINS OF THE WAR WITH MEXICO (1967). For a description of the Mexican-American War in California and subsequent displacement of Mexicanos see LEONARD PITT, THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890 (1966). For a discussion of post-war displacement in a specific California community see ALBERT CAMARILLO, CHICANOS IN A CHANGING SOCIETY: FROM MEXICAN PUEBLOS TO AMERICAN BARRIOS IN SANTA BARBARA AND SOUTHERN CALIFORNIA, 1848-1930 (1979). For specific discussion and varied analysis of stereotypes of Mexicanos in North American literature see JAMES HART, AMERICAN IMAGES OF SPANISH CALIFORNIA (1960); CECIL ROBINSON, WITH THE EARS OF STRANGERS: THE MEXICAN IN AMERICAN LITERATURE (1963); DAVID J. WEBER, SCARCE MORE THAN APES': HISTORICAL ROOTS OF ANGLO-AMERICAN STEREOTYPES OF MEXICANS IN NEW SPAIN'S FAR NORTHERN FRONTIER 293-304 (1979); Harry Clark, *Their Pride, Their Manners, and Their Voices: Sources of the Traditional Portrait of Early Californians*, 53 CAL. HIST. REV. 71-82 (1974); James H. Lacy, *New Mexico Women in Early American Writings*, 52 N. M. HIST. REV. 34 (1959); David Langum, *California Women and the Image of Virtue*, 59 SOUTHERN CAL. Q. 245-250 (1977); Janet Le Compte, *The Independent Women of Hispanic New Mexico, 1821-1846*, 12 WESTERN HIST. Q. 17-35 (1981); Doris L. Meyer, *Early Mexican American Responses to Negative Stereotyping*, 53 N. M. HIST. REV. 75-91 (1978); Raymond A. Paredes, *The Mexican Image in American Travel Literature, 1831-1869*, 52 N. M. HIST. REV. 5-59 (1977); Raymond A. Paredes, *The Origins of Anti-Mexican Sentiment in the United States*, 6 NEW SCHOLAR 139-165 (1977); Beverly Trulio, *Anglo American Attitudes Toward New Mexican Women*, 12 J. OF THE WEST 239, 289 (1973).

161. Haney López, *supra* note 143, at 28.

can's nationality and race began to appear in North American literature. While this historical literature purports to present accurate descriptions of the Mexican experience in the United States, it actually constructs stereotypic images by conflating the Mexican race and nationality.<sup>162</sup> Moreover, this literature has long influenced perceptions and interpretations of Mexican-Americans.

Some of the best literary examples of the conflation are of Mexicans living in California<sup>163</sup> during the mid-nineteenth century. The conflationary images of "Californianos"<sup>164</sup> were fixed by the accounts written by Anglo-American travelers and adventurers between 1820 and 1847. In Thomas Jefferson Farnham's *Travels in California and Scenes in the Pacific Ocean*, he describes the Mexicans as "an imbecile, pusillanimous race of men, and unfit to control the destinies of that beautiful country."<sup>165</sup>

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162. Leslie Fiedler is fascinated by the ambivalence in American literature about portrayals of Indians and blacks. Alternately, these people represent a lost Eden of strength and innocence and yet a hell of uncontrolled lustfulness and cruelty. Much the same is true of literary images of Mexicans and other Hispanics. Fiedler follows general theories of prejudice in suggesting that such ambivalence, deeply embedded in American culture, permits Anglo Americans to project their own unwanted impulses on the members of minorities. This is a cultural-psychological function of racial stereotypes, and it helps to explain why it is the mestizo (mixed-blood Hispanics) about whom the literary stereotyping was most glaring. The "pureblood Castilians," men and women alike, were seen in a relatively favorable light. See LESLIE FIEDLER, *WAITING FOR THE END* 118-129 (1964).

163. According to Rudolfo Acuña:

California, fronting the Pacific Ocean, was the most isolated province in New Spain. Travel by land or sea was slow, dangerous, and costly. The Spaniards did not colonize California until 1769, when Spain sent a majority of mixed-blood subjects—Spanish, Indian, and Black—to plant the Spanish flag and colonize the half-million indigenous peoples there. During most of the Spanish period, the mission system served as the backbone of colonialism. Gradually, civilian pueblos evolved from the presidios (forts) that supported the missions and chartered Indian communities. Spanish authorities allocated some land grants, and the rancho culture spread during this period. Labor, whether in the missions or on the ranchos, was performed mostly by the indigenous peoples. Because of California's location and Spanish policy forbidding trade outside the Spanish empire, trade did not regularly occur until after Mexican independence.

ACUÑA, *supra* note 107, at 107.

There were similar literary accounts made about Mexicans in Texas. See CECIL ROBINSON, *WITH THE EARS OF STRANGERS: THE MEXICAN IN AMERICAN LITERATURE* (1963); see also DE LEÓN, *supra* note 110 (discussing Anglos' attitudes toward Mexicans in Texas from 1821 to 1900). The famous Sam Houston, leader of the Texas Americans, "consistently thought of the struggle in his region as one between a glorious Anglo-Saxon race and an inferior Mexican rabble." See HORSMAN, *supra* note 155, at 213.

164. "Californianos/a" is another name for Mexican-Americans residing in California.

165. THOMAS JEFFERSON FARNHAM, *TRAVELS IN CALIFORNIA AND SCENES IN THE PACIFIC OCEAN* 148 (reprint ed., 1947) (1844).

This theme of Anglo-Americans as the superior "race" and Mexicans as the inferior "race" is fully detailed in one of Farnham's earlier works entitled *Life, Adventures, and Travel in California*:

No one acquainted with the indolent, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of Nature which curses the mulatto here with a constitution less robust than that of either race from which he sprang, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away; while the mixing of different branches of the Caucasian family in the States will continue to produce a race of men, who will enlarge from period to period the field of their industry and civil domination, until not only the Northern States of Mexico, but the Californians also, will open their glebe to the pressure of its unconquered arm. The old Saxon blood must stride the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own unaided might, erect the altar of civil and religious freedom on the lands of the Californians.<sup>166</sup>

Farnham's racist images demonstrate two important points about the conflation. First, that the transformation of "Mexican" from a nationality to a race is buttressed by the justifications of the Monroe Doctrine and Manifest Destiny, the prevailing expansionist policies and ideologies of nineteenth century America. These policies and ideologies served to forge an image of Anglo-Americans as superior beings, "custodians of democracy,"<sup>167</sup> destined to spread its principles. At the same time, these policies and ideologies served to perpetuate homogenizing popular perceptions of Mexicans, and other Latin American origin groups as "foreign Others," excluded from the nation's self-identity.<sup>168</sup> As Ian Haney López argues, "Farnham's racialization of Mexicans did not occur in a vacuum,

166. *Id.*

167. The term "custodians of democracy" is from ACUÑA, *supra* note 104, at 13.

168. Kimberlé Crenshaw describes the subordinate "other" in the context of African-Americans:

Like legal consciousness, race consciousness makes it difficult—at least for whites—to imagine the world differently. It also creates the desire for identification with privileged elites. By focusing on a distinct, subordinate 'other,' whites include themselves in the dominant circle—an arena in which most hold no real power, but only their privileged racial identity. Consider the case of a dirt-poor, southern white, shown participating in a Ku Klux Klan rally in the movie *Resurgence*, who declared: "Every morning, I wake up and thank God I'm white." For this person, and for others like him, race consciousness—manifested by his refusal even to associate with Blacks—provides a powerful explanation of why he fails to challenge the current social order.

Crenshaw, *supra* note 104, at 138 (footnotes omitted); accord LYNN D. TROST, *WESTERN METAPHYSICAL DUALISM AS AN ELEMENT IN RACISM, IN CULTURAL BASES OF RACISM AND GROUP OPPRESSION* 49, 49-84 (John L. Hodge et al. eds., 1975) (observing the "dualistic nature" of racist beliefs).

but in the context of a dominant ideology, perceived economic interests, and psychological necessity."<sup>169</sup>

The ideology of the nation's manifest destiny, which in effect declares the superiority of Anglo-Americans, is exemplified by Farnham's assurance to his readers that "the indolent, mixed race" of California will never populate nor govern California. Moreover, by accentuating the mixed racial nature of the Mexicans by referring to them as "mulatto," a breed of people which have been "cursed" by Nature for mixing races, Farnham demonstrates the inferiority of the Mexicans. He adds that their mixed race, and thus inferior status, will not stand in the way of the "old Saxon blood" which will "erect the altar of civil and religious freedom on the lands of the Californias."<sup>170</sup>

Implicit and explicit in Farnham's narrative is justification of the conquering of the Mexicans and the annexation of California. The racialization of the Mexicans in Farnham's narrative<sup>171</sup> is important in creating an image of an inferior "race" which does not have the "constitution" to govern their own land.

The second important point about the conflation demonstrated by Farnham's narrative is that races are socially constructed,<sup>172</sup> and

169. See Haney López, *supra* note 143, at 30.

170. See FARNHAM, *supra* note 165, at 413.

171. *Id.* at 148. Richard Henry Dana, a proper Bostonian visiting California in 1835, described the Mexicans of California as "an idle, thriftless people." RICHARD HENRY DANA, JR., *TWO YEARS BEFORE THE MAST* (reprint ed. 1965) (1840). The inhabitants were described by other observers, at best as a "proud, indolent people doing nothing but riding after herds from place to place." C. CAMP, *JAMES CLYMAN: AMERICAN FRONTIERSMAN 1792-1881, HIS OWN REMINISCENCES AND DIARIES* 187 (California Historical Society 1928).

172. Ian Haney López states:

Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. The process by which racial meanings arise has been labeled racial formation. In this formulation, race is not a determinant or a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing societal forces. Racial formation includes both the rise of racial groups and their constant reification in social thought. I draw upon this theory, but use the term "racial fabrication" in order to highlight four important facets of the social construction of race. First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation. Fabrication implies the workings of human hands, and suggests the possible intention to deceive. More than the industrial term "formation," which carries connotations of neutral constructions and processes indifferent to individual intervention, referring to the fabrication of races emphasizes the human element and evokes the plastic and inconstant character of race.

Haney López, *supra* note 143, at 27-28. For discussions on "racial formation" see OMI & WINANT, *supra* note 86, at 55-56.

as such, "ideas about race form part of a whole social fabric into which other relations, among them gender and class, are also woven."<sup>173</sup> As Ian Haney López argues, "Farnham's choice of martial and masculine imagery is not an accident but a reflection of close symbiosis in the construction of racial and gender hierarchies during the nineteenth century."<sup>174</sup> Farnham, unlike other writers of his time, uses the same strong racial harshness to describe Mexican women, of whom he states, "[t]he ladies, dear creatures, I wish they were whiter, and that their cheekbones did not in their great condescension assimilate their manners and customs so remarkably to their Indian neighbors."<sup>175</sup>

In 1840, Richard Henry Dana in *Two Years Before the Mast*, presented the first major image of Mexican women in California.<sup>176</sup> Dana, a Bostonian, sailed to California on a ship engaged in the hide and tallow trade. In this work, he recorded his impressions of Mexican women. According to Dana:

The fondness for dress among the women is excessive, and is sometimes their ruin. A present of a fine mantel, or a necklace or pair of earrings gains the favor of a greater part. Nothing is more common than to see a women living in a house of only two rooms, with the ground for a floor, dressed in spangled satin shoes, silk gown, high comb, gilt if not gold, earrings and necklace. If their husbands do not dress them well enough, they will soon receive presents from others.<sup>177</sup>

Therefore, Dana points out, "the women have little virtue," and "their morality is, of course, none of the best."<sup>178</sup> To Dana, Mexican women are without virtue and morals, purely sexual creatures. This view of Mexican women as women of easy virtue and latent infidelity led to the stereotype of the Mexican prostitute in the literature of the gold rush.

The conflation of race and nationality became more pronounced with respect to Mexican-Americans in nineteenth century America. The supplementation of Mexican national identification with a racial categorization demonstrated by the early literary portrayals of Mexicans or Californianos in California, continued to occur with respect to Mexican-Americans—who had received their United States citizenship under the Treaty of Guadalupe Hidalgo. One of the best examples of the dissemination of Mexican racial images is the characterization of all Latin American origin people as "cholos"

173. See FARNHAM, *supra* note 165, at 30.

174. Haney López, *supra* note 143, at 30-31.

175. FARNHAM, *supra* note 165, at 148.

176. See DANA, *supra* note 171.

177. *Id.* at 66.

178. *Id.*



(pejorative term for low-caste or "half-breed" Mexicans) during the Gold Rush of 1849.<sup>179</sup>

The Gold Rush of 1849 brought many Anglo-Americans, Mexicans and South Americans to California. Mexican-American elites attempted to ally themselves with Anglo-Americans, while at the same time distancing themselves from the newly-arrived "cholo" masses.<sup>180</sup> Anglo-Americans failed to note the distinction between the Mexican-American elites and the "cholos," in their eyes all Latin American origin people were "cholos." As Leonard Pitt observed, [to the Anglo-Americans], "whether from California, Chile, Peru, or Mexico, whether residents of 20 years' standing or immigrants of one week, all Spanish-speakers were lumped together as 'interlopers' and 'greasers'."<sup>181</sup>

Similar sentiments existed in the California legislature. The homogenization of the social and racial differences among Latin American populations and the racialization of such populations is exemplified by G. B. Tingley of Sacramento, who described Mexicans and Latin Americans in the following terms:

Devoid of intelligence sufficient to appreciate the true principles of a free form of government; vicious, indolent, and dishonest, to an extent rendering them obnoxious to our citizens; with habits of life low and degraded; an intellect but one degree above the beast in the field, and not susceptible of elevation; all these things combined render such classes of human beings a curse to any enlightened community.<sup>182</sup>

The homogenization of Latin American populations in nineteenth century America under the fused categories of race and nationality is also exemplified by the term "greasers." "Greaser" was a term commonly used in a racial way to describe the former Mexican citizens living in recently acquired territories. Americans began

179. On January 24, 1848, gold was found in California. By 1949, nearly 100,000 miners panned for gold, including Anglo-Americans, Mexicans and South Americans. See ROBERT F. HEIZER & ALLAN F. ALMQUIST, *THE OTHER CALIFORNIANS* 144 (1971). See generally JOSÉ BANDINI, *A DESCRIPTION OF CALIFORNIA IN 1828* (1951), reprinted in *MEXICAN CALIFORNIA* (Carlos E. Cortés ed., 1976).

180. According to Suzanne Oboler, in 1849 alone, 100,000 newcomers from all over the world arrived in California, including 8,000 Mexicans and 5,000 South Americans. See OBOLER, *supra* note 29, at 35.

181. ACUÑA, *supra* note 107, at 119 (quoting LEONARD PITT, *DECLINE OF THE CALIFORNIAS* 53 (1970)).

182. See Leonard Pitt, *The Foreign Miner's Tax of 1850: A Study of Nativism and Anti-Nativism in Gold Rush California* (1955) (unpublished M. Thesis, UCLA). One of the first pieces of legislation passed by the State of California was a Foreign Miner's tax, aimed at excluding Latin American miners from claiming rights in the gold fields. The native born Californios were considered to be foreigners for this purpose, in spite of being legally citizens. See generally R. H. PETERSON, *MANIFEST DESTINY IN THE MINES: A CULTURAL INTERPRETATION OF ANTI-MEXICAN NATIVISM IN CALIFORNIA, 1848-1853* (1975).

to call Mexicans "Yellow-bellied greasers" and to develop the notion that Mexicans by race were naturally cowards.<sup>183</sup> Initially, the term "greaser" was used exclusively to describe Mexicans in Texas, New Mexico, Arizona, and early California.<sup>184</sup> However, after the arrival of other Latin Americans, especially in the gold fields of California after the Gold Rush of 1849, the term "greaser" was applied to all persons of Latin American origin. Although there were four distinct Latino groups in California in 1850—the Californios (originally born in Mexican territory, but by then citizens of the United States under the Treaty of Guadalupe Hidalgo), Mexicans, Peruvians, and Chileans—the mining society tended to view them all as one race, generally lumping them all together under the term "greaser." For policy purposes, they were treated as one group. In 1856, the California Assembly refused to fund the translation of laws into Spanish and further passed an anti-vagrancy act which was commonly referred to as the "Greaser Act"<sup>185</sup> because it specified, "all persons who are commonly known as 'Greasers' or the issue of Spanish or Indian blood."<sup>186</sup>

*b. "Good Women," "Bad Women": The Californianas*

The images of stereotypical Mexican-American women—the Californianas—in nineteenth century America presented the polar portrayals of the "bad" and "good" women. Both of these images conflated the race and nationality of Californianas, although in different ways.<sup>187</sup> The "bad women" stereotype depicted the Californianas as inferior beings because of their dark skin and Indian features. By contrast, the "good women" stereotype elevated elite Californianas to a higher sphere due to their European ancestry and elite class status, thus legitimizing the intermarriages between Californianas and Anglo-Americans. Both stereotypes mold the conflation in the sexual definitions of women's virtue and morality of

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183. The belief in the cowardice of Mexicans is illustrated in the simplified popular Anglo mythology about the defense of the Alamo. Legend built a story about how a small, but brave band of Anglo Texas rebels defied overwhelming numbers of cowardly Mexican troops. See DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* 4, 82-83; ARTHUR G. PETTIT, *IMAGES OF THE MEXICAN AMERICAN IN FICTION AND FILM* 45-46 (1980). See also DIEGO VIGIL, *EARLY CHICANO GUERRILLA FIGHTERS* (1974).

184. See PETTIT, *supra* note 183, at 41-42.

185. 1855 Cal. Stat. 175, excerpted in ROBERT F. HEIZER & ALAN J. ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920* 151 (1971).

186. *Id.*

187. For an excellent discussion on the images of Californianas, see generally Antonia I. Castañeda, *The Political Economy of Nineteenth Century Stereotypes of Californianas*, in *BETWEEN BORDERS: ESSAYS ON MEXICANA/CHICANA HISTORY* 213 (Adelaida R. Del Castillo ed., 1990).

nineteenth century America. Thus, "bad" Californianas are racially inferior and lack virtue, while "good" Californianas are of European ancestry and universally chaste.

Generally, the images or stereotypes of Californianas in nineteenth century America revolved around the issue of women's virtue and morality. These stereotypes were both sexually and racially defined.<sup>188</sup>

The dimension of class was an important issue with respect to the Californianas. Elite Californianas were depicted as virtuous, beautiful, industrious and white. Alfred Robinson, in his book, *Life in California*, contends that "the female portion of the community, it is worthy of remark, do not seem to have felt its influence, and perhaps there are few places in the world where in proportion to the number of inhabitants, can be found more chastity, industrious habits, and correct deportment, than among the women of this place."<sup>189</sup> As Antonia Castañeda argues, "Robinson defended the morals, virtue and racial purity of elite Californianas."<sup>190</sup>

The images of the Californianas of nineteenth century America add the dimension of sex to the conflation. While Dana and Farnham construct images of Californianas as women of easy virtue, no morals, and racial inferiority, Robinson portrays the elite Californianas as different than the rest. The elite Californiana, according to Robinson, is outside the mold of the others because she is "saved" by her elite status. As Antonia Castañeda argues, "[h]er European ancestry and aristocratic background, to say nothing of her economic value, made her worthy of marriage."<sup>191</sup>

Recently, Chicano historians and scholars have studied these dichotomous images of the Californianas in nineteenth century works written by Anglo-American writers.<sup>192</sup> These new examinations have stimulated and provoked quite a conversation. David Langum, who recognizes the existence of the dual images, argues that the

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188. *Id.* at 221.

189. See ALFRED ROBINSON, *LIFE IN CALIFORNIA BEFORE THE CONQUEST* 13 (1969).

190. Castañeda, *supra* note 187, at 218.

191. *Id.*

192. For an excellent series of historiographical essays see *Part I: Historiography on Women*, in *LIBERATING WOMEN'S HISTORY: THEORETICAL AND CRITICAL ESSAYS* 1 (Bernice A. Carroll ed., 1976). See also ANN D. GORDON, ET AL., *WOMEN IN AMERICAN HISTORY* (1972); Barbara Sicherman, *Review Essay: American History*, 5 SIGNS: J. WOMEN IN CULTURE & SOC. 461 (1975); Joan M. Jensen & Darlis A. Miller, *The Gentle Tamers Revisited: New Approaches to the History of Women in the American West*, 44 PAC. HIST. REV. 173 (1980). For treatment of specific themes see ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* (1981); JULIE ROY JEFFREY, *FRONTIER WOMEN: THE TRANS-MISSISSIPPI WEST, 1840-1880* (1979); ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED* 2-101 (1981); CAROLYN WARE, "Introduction," in *CLASS, SEX AND THE WOMAN WORKER*, 3-19 (Milton Cantor & Bruce Laurie eds., 1979).

negative image was the minority view.<sup>193</sup> He further argues that this image was class-based. The image was not only derived by upper class Anglo-Americans like Dana, but more importantly, the subjects of the image were lower-class Californianas. Langum attributes the contradictory images of Californianas to the class prejudice of the writers and the class origin of the subjects, while assuming that the stereotypes were accurate for lower-class women.<sup>194</sup> Against this view, Janet Le Compte cites the Anglo-American norms for proper female behavior as the real basis for the negative views of Californianas.<sup>195</sup> Le Compte argues that these norms were conditioned by the more restrictive position of women in North American society and culture.<sup>196</sup> Finally, Antonia Castañeda argues that both Langum and Le Compte failed to recognize that the changing image of Californianas "derived from America's unfolding system of beliefs and ideas about sex and race, as well as about economic and political expansion."<sup>197</sup>

The dichotomous stereotypes of Californianas emerged due to the prescribed ideas and definitions of women's role "derived from the ethos of the bourgeois class whose hegemony extended to the definition and production of culture."<sup>198</sup> The American woman became the symbol of the country's innocence, morality and virtue. However, for Californianas, the added dimension of race was also integral to the judgment of their virtue and morality. Thus, Anglo-American writers, with their racial bias against Californianas, created a stereotype of them as both racially and morally inferior—the "bad women" of easy virtue and no morality. According to Castañeda, "[s]tereotypes of Mexican women's morality not only encompassed both the sexual and racial dimensions, but were also the basis for moral judgments about Mexican people as a whole."<sup>199</sup>

On the other hand, the positive image of Californianas emerged from the numerous intermarriages between elite Californianas and Anglo-American males.<sup>200</sup> The positive images written by Anglo-American husbands of elite Californianas were as pejorative in nature as the negative images. For the most part, the elite Californi-

193. See David J. Langum, *Californio Women and the Image of Virtue*, 59 S. CAL. Q. 245, 245-250 (1977).

194. *Id.* at 245-252.

195. See Le Compte, *supra* note 160, at 17-35.

196. *Id.*

197. See Castañeda, *supra* note 187, at 221.

198. *Id.* at 227.

199. *Id.* at 223.

200. For example, in 1837 Alfred Robinson married Ana Maria de la Guerra of the elite de la Guerra y Noriega family of Santa Barbara. *Id.* at 218.

anas were of mixed-blood or mestizo origin and they were not aristocratic by birth.<sup>201</sup> As Castañeda contends:

[I]n Europeanizing Californiana *mestizas* and *mulatas* and proclaiming them industrious, moral and chaste, the corrective image justified and rationalized the union of a racially, morally superior Anglo man to a woman of an inferior racial and moral stock. Robinson's Europeanization of Californianas fulfilled Thomas Jefferson Farnham's racist wish that "the ladies, dear creatures," be made whiter. Finally, the new image transformed elite Californianas into the epitome of the ideal woman enshrined in the cult of True Womanhood. Once the conquest was at hand, the portrayal of Californianas shifted from a negative to a positive image and severed her from her racial, cultural and historical reality.<sup>202</sup>

## 2. "*Boricuas*" and Natives: Images of Puerto Ricans

As in the case of Mexican-Americans, nineteenth century pejorative portrayals of Puerto Ricans illustrate the conflationary process at work. Again, these early images, which later hardened into stereotypes, were embedded in the Anglo-American notion of manifest destiny and supremacy. The annexation of Puerto Rico, and the incorporation of Puerto Rican territory to the United States were bound up in a process by which a national identification was supplanted by a racial one. Thus, not unlike Mexican-Americans, the early negative images of Puerto Ricans were focused on their racial characteristics and alleged debased condition.

The first conflationary images of Puerto Ricans were brought back to the mainland by the United States military, which occupied the island during the Spanish-American War. Although the military was enthusiastic about the island from a military perspective, their

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201. The census and mission registers recording population, births, marriages and deaths during the Spanish period clearly indicate the racial (for both men and women) and class (occupations, for men only) origins of the people who came as military personnel or as settlers. While people often elevated their racial status in these records by designating themselves "Español" even though it was physically evident that they were of mixed blood, the records nevertheless reveal the population was largely mestizo, which included various racial mixtures. The following list of census records includes only those censuses which listed race and/or occupation for the Monterey District. Unless otherwise indicated, these records are all in the Bancroft Library, Provincial State Papers, Benicia Military; Real Presidio de Monterey, Lista de la compañía del referido presidio, 30 julio de 1782, Vol. IV, pp. 663-694; Lista de la compañía, 23 mayo de 1791, Vol. XV, pp. 10-12; Lista de los individuos de esta jurisdicción que se consideran aptos para el servicio en la compañía de milicia . . . que se hallen en este presidio, 1805, Monterey; Padrón del Real Presidio de Monterey, 1816, vol. 49, p. 894; MISSION OF SAN CARLOS BORROME0, BOOK OF MARRIAGES, VOL. I, 1772-1855 (Monterey: Archdiocese of Monterey). The Book of Marriages that researchers work with at the Archdiocese is a photocopy of the original Libro de matrimonios.

202. See Castañeda, *supra* note 187, at 224.

descriptions of the Puerto Rican people as "lazy" and "dirty" natives were disturbing. As Suzanne Oboler contends:

[s]ome Americans found a population that, particularly among the working class and the poor, seemed "patient" and "docile," their very gentleness permitting "the unjust scale of wages they receive to become the custom." Others, however, saw "the natives" as "lazy and dirty, but . . . very sharp and cunning," and found that "the introduction of American ideas disturbs them little, they being indifferent to the advantages offered."<sup>203</sup>

A white U.S. officer noted that "the people seem willing to work, even at starvation wages, and they seem to be docile and grateful for anything done for them. They are emotional. . . ." <sup>204</sup>

Images of lazy, submissive Puerto Ricans persisted, particularly after the passage of the Foraker Act of 1900 (the "Act").<sup>205</sup> The Act, largely aimed at exacting tariffs on Puerto Rico's agricultural products, also denied, for the first time in United States history, both territorial status and constitutional protection and citizenship to the newly acquired territory.<sup>206</sup> At least some of the Congressmen were concerned about the "race" of Puerto Ricans. One Congressman remarked:

I am opposed to increasing the opportunities for the millions of negroes in Puerto Rico and the 10,000,000 Asiatics in the Philippines of becoming American citizens and swarming into this country and coming in competition with our farmers and mechanics and laborers. We are trying to keep out the Chinese with one hand, and now you are proposing to make Territories of the United States out of Puerto Rico and the Philippine Islands, and thereby open wide the door by which these negroes and Asiatics can pour like the locusts of Egypt into this country.<sup>207</sup>

203. See OBOLER, *supra* note 29, at 36, quoting Frank Bonilla, *Beyond Survival: Por qué seguiremos siendo Puertorriqueños*, in THE PUERTO RICANS 453-54 (Adalberto López ed., 1974)).

204. Frank Bonilla, *Beyond Survival: Por qué Seguiremos Siendo Puertorriqueños*, in PUERTO RICO AND PUERTO RICANS 439 (Adalberto López ed., 1974).

205. The Foraker Act of 1900 established the civilian government in Puerto Rico. For the most part, government power was placed in the hands of the President of the United States who appointed the island's Governor. The legislature was composed of an Executive Council and a House of Delegates. The Council contained an American majority, the members of the House were elected by Puerto Rican voters. Any laws passed by the House were subject to veto powers of the United States Congress. See U.S. COMMISSION ON CIVIL RIGHTS, PUERTO RICANS IN THE CONTINENTAL UNITED STATES: AN UNCERTAIN FUTURE 12-13 (1976).

206. According to Suzanne Oboler:

"This initially provoked heated partisan debate between Democrats and Republicans alike, both of which favored the bill's economic advantages while seeking to avoid blame for what were clearly colonialist implications of the new territorial status created for Puerto Rico." OBOLER, *supra* note 29, at 37.

207. BENJAMIN RINGER, "WE THE PEOPLE" AND OTHERS: DUALITY AND AMERICA'S TREATMENT OF ITS RACIAL MINORITIES 973 (1983). Benjamin Ringer points out that varied political and economic concerns made it inexpedient for members

The Congressman's remarks illustrate two important points about the nature of the conflation with respect to Puerto Ricans. First, the racialization of the Puerto Ricans, like that of the Mexicans, did not occur in a vacuum, but in the context of a dominant Anglo-American ideology which embraced the notion of racial, moral, economic and political superiority of Anglo-Americans. In this Congressman's opinion, these "negroes" do not deserve to become American citizens, but he does not object to the annexation of Puerto Rico. By focusing only on the "negroes" and thus homogenizing all Puerto Ricans under the "negro" label, the congressman effectively racialized the whole Puerto Rican population. This racialization ignores the fact that, by the end of the century, the island's population was comprised of thirty-four nationalities.<sup>208</sup>

Second, the imposition of discrete mainland categories of black and white on Puerto Ricans, whose home culture saw, and still sees, racial diversity on a continuum,<sup>209</sup> sets the conflation in a "black/white" paradigm that would set the framework for Latinos in the twentieth century.<sup>210</sup> The white/black paradigm was the original model of racism in the United States.

These racial overtones continued even when Puerto Ricans<sup>211</sup> were granted full citizenship in 1917 by the Jones Act.<sup>212</sup> The Jones

of either party to raise the issue of race as part of the debate; but as the quote above illustrates, race was still part of the congressional dialogue. *Id.*

208. See LUIS ANTONIO CARDON, A HISTORY OF THE PUERTO RICANS IN THE U.S.A. 8-9 (1990); MANUEL MALDONADO-DENIS, PUERTO RICO, A SOCIO-HISTORIC INTERPRETATION 13-14 (Elena Vialo trans., 1972); ERIC WILLIAMS, FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN 1492-1969 109, 291 (1970).

209. In Puerto Rican society, the culture recognizes a spectrum of several racial categories based on multiple physical characteristics and not just skin color. In addition, Puerto Rican society is more integrated than United States society. See generally CLARA E. RODRIGUEZ, PUERTO RICANS: BORN IN THE U.S.A. 1-10 (1989).

210. As Elizabeth Martínez observes:

To criticize the Black-white framework is not simply a resentful demand from other people of color for equal sympathy, equal funding, equal clout, equal patronage. It is not simply us-too resentment at being ignored or minimized. It is not just another round of mindless competition in the victimhood tournament. Too often we make the categories of race, class, gender, sexuality, age, physical condition, etc., contend for the title of 'most oppressed.' Within 'race,' various population groups then compete for that top spot. Instead, we need to understand that various forms and histories of oppression exist. We need to recognize that they include differences in extent and intensity. Yet pursuing some hierarchy of competing oppressions leads us down dead-end streets where we will never find the linkage between oppressions or how to overcome them.

Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 23 (1993).

211. Several terms have been used to identify second-generation Puerto Ricans born and/or reared on the U.S. mainland. J.P. Fitzpatrick was the first to use the term "Puerto Rican Americans," but it was widely rejected by members of this group, who felt they were not "American"; others considered it redundant, since Puerto Ricans are U.S. citizens by birth. See J.P. FITZPATRICK, PUERTO RICAN-AMERICANS: THE

Act created a citizen that was not afforded all of the citizenship rights held by other United States citizens. For example, Puerto Ricans living in Puerto Rico were not allowed to vote in American elections, although adult males were subject to obligatory military service.

B. *The Conflation in the Twentieth Century: Formal Confusion of Race and Nationality*

In the twentieth century the state has legitimized the conflation, thus creating, despite the heterogeneity of the population involved, a "race" that presumably can be described on the basis of real and identifiable traits. The umbrella definitions of "Hispanic" or "Spanish Origin" have the objective effect of minoritizing the world. These "broad" classifications ignore social-class and national-origin differences among people, thus blurring the differences between United States "minority groups" and immigrants. In the socially constructed realities created by these classifications, Latin American origin populations are a minority group.<sup>213</sup>

1. *Examples of Conflation in the Early Twentieth Century*

The formal and institutionalized nature of the conflation of race and nationality is illustrated by three events in the early part of the twentieth century. The three examples of the transition of con-

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MEANING OF MIGRATION TO THE MAINLAND 1-10 (1971). The term, "mainland Puerto Rican" became the more acceptable term, especially among scholars of the Hispanic experience in the United States refer to the second generation of "Puerto Ricans," as do a number of Puerto Rican scholars when referring to anyone of Puerto Rican ancestry or national origin. See M. MALDONADO-DENIS, *PUERTO RICO Y ESTADOS UNIDOS: EMIGRACIÓN Y COLONIALISMO* 3-7 (1976). The term "Nuyoricán" has also been used, originating from the fact that the largest concentration of second-generation Puerto Ricans is in New York City. See E. SEDA-BONILLA, *REQUIEM POR UNA CULTURA* 1-5 (1972). See generally Virginia Sanchez-Korrol, *Latinismo Among Early Puerto Rican Migrants in New York City: A Sociohistoric Interpretation*, in *THE HISPANIC EXPERIENCE IN THE UNITED STATES* (Edna Acosta-Belén & Barbara Sjoström eds., 1988).

212. See CLARENCE SENIOR, *OUR CITIZENS FROM THE CARIBBEAN* 16 (1965).

213. According to Martha Giménez:

These [classifications] are racist in that (1) they reduce people to a set of stereotyped, generally negative traits which presumably define their culture and identity and predict a given set of negative behaviors (e.g., high rates of crime, drug addiction, out-of-wedlock child-bearing, welfare dependency, etc.), (2) they reduce people to interchangeable generic entities, negating the qualitative differences between, for example, persons of Puerto Rican descent who have lived for generations in New York City and newly arrived immigrants from Chile or some other South or Central American country, and (3) they reinforce racism in the society as a whole by encouraging the perception of people in racial/ethnic terms rather than in such terms as social class or national origin.

Giménez, *supra* note 95, at 8-9.



flationary images from literary works or speeches, to more institutionalized or formal spheres all involve Mexicans. At the turn of the century, the Mexican population was the largest of the Latin American groups, while in 1850, two years after the execution of the Treaty of Guadalupe-Hidalgo, there were perhaps 80,000 Mexican Americans.<sup>214</sup> Mexican immigration from 1900 to 1930 was a major contributor to the Mexican American population.<sup>215</sup> The flows of Puerto Ricans and Cubans occurred towards the middle of the twentieth century.

*a. Los Angeles County Health Department Statistics*

In the early part of the twentieth century the Los Angeles County Health Department began to compile statistics for Latinos of Mexican origin.<sup>216</sup> At the time, there was a national debate over immigration and national origin quotas, and thus the statistics were the Department's way of gathering evidence in light of this debate. By 1916, death and infant mortality statistics were reported for "White" and "Mexican" people. Thus, the racial category "White" was compared to the national origin category "Mexican." In a similar manner, statistics for nursing services were presented for "White, Mexican and Other (Negro or Oriental)."<sup>217</sup>

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214. See Oscar J. Martinez, *On the Size of the Chicano Population: New Estimates, 1850-1900* 6 AZTLAN 43, 43-67 (1975); Richard L. Nostrand, *Mexican Americans Circa 1850*, 65 ANNALS ASS'N AM. GEOGRAPHERS 378, 378-390 (1975).

215. Between 1910 and 1930, Mexican immigrants to the United States averaged 30,462 per year with the greatest number (87,648) coming in 1924 and the lowest number (10,954) entering in 1913. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1981). See generally IMMIGRANTS—AND IMMIGRANTS: PERSPECTIVES ON MEXICAN LABOR MIGRATION TO THE UNITED STATES (Arthur Corwin ed., 1978); HENRY CROSS & JAMES A. SANDOS, ACROSS THE BORDER: RURAL DEVELOPMENT IN MEXICO AND RECENT MIGRATION TO THE UNITED STATES (1981); NANCIE L. GONZÁLEZ, THE SPANISH-AMERICANS OF NEW MEXICO: A HERITAGE OF PRIDE (1967); Richard L. Nostrand, *The Hispanic-American Borderland: Delimitation of an American Culture Region*, ANNALS ASS'N AM. GEOGRAPHERS 638-661 (Dec. 1970); Richard L. Nostrand, *The Hispano Homeland in 1900*, ANNALS ASS'N AM. GEOGRAPHERS 382, 382-369 (Sept. 1980); Richard L. Nostrand, "Mexican American" and "Chicano": Emerging Terms for a People Coming of Age, in THE CHICANO 143, 143-160 (1975). The mining frontiers of the western United States were the first major attraction for Mexican migrant labor. Mexican laborers from the northern states of Sonora, Chihuahua, Durango, and Zacatecas responded to the demand for workers in California, Nevada, and Arizona. Practically every mining community in the West had a Mexican district. Jerome, Arizona, for example, was a copper mining town where Mexican labor was used from the late nineteenth century to the peak of the production years just before the depression. The town became a major destination for Mexican immigrants and a jump-off point for migration to other parts of the West. See generally CAREY MCWILLIAMS, NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES (1968).

216. I use the term "Latinos" here because by the turn-of-the century all of the three major Latino groups were in the United States.

217. C. C. YOUNG, MEXICANS IN CALIFORNIA, REPORT OF THE MEXICAN FACT FINDING COMMITTEE 46 (1930).

The Los Angeles County Health Department statistics are the earliest examples of the conflation becoming institutionalized. The fusion of race with nationality reflected in the terminology and methodology used by Los Angeles County, not only racializes the entire population of Latinos of Mexican origin, but it also fails to contextualize the specific histories and cultures that differentiate Mexican-Americans from Mexican immigrants. In so doing, the Mexican-Americans are combined with the turn-of-the century immigrants from Mexico. The racialized term, "Mexican," homogenizes class experiences and neglects many different linguistic, racial, and ethnic groups within the Mexican nationality.<sup>218</sup>

*b. California's "Mexican Fact Finding Committee"*

In 1929, Governor Young of California appointed the "Mexican Fact Finding Committee" to gather data about Latinos of Mexican origin for policy purposes. In its final report, the Committee noted that Mexicans were racially distinct from "Whites" in that "the bulk of immigration from Mexico into the United States is from the pure Indian or the Meztizo stocks of the Mexican population."<sup>219</sup> The report illustrates two important points about the nature of the conflation. First, the transformation of "Mexican" from a nationality to a race is being incorporated in reports to the Governor of California to be used for policy decisions. The racialized images of Mexicans have transcended the literary arena or popular discourse, into official government documents. Second, because races are constructed, the Mexican "race" begins to be constructed as one consisting of mixed-blood or indigenous populations.

2. *The National Census*

The confusion of race for nationality was formalized by the United States Bureau of the Census.<sup>220</sup> The deliberate mixing by the Census Bureau of the concepts of race, nationality, and country of origin, placed the confusion on a national scale. While the earliest standardized censuses, from 1820 to 1860, included three racial categories, White, Negro (Free or Slave), and Other, there was a

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218. For example, the Mexican population consists of various indigenous populations, descendants of enslaved Africans, and descendants of immigrant populations from every country in Europe, Asia, and the Middle East. See J. Jorge Kler de Alva, *Telling Hispanics Apart: Latino Sociocultural Diversity*, in *THE HISPANIC EXPERIENCE IN THE UNITED STATES: CONTEMPORARY ISSUES AND PERSPECTIVES* 107-36 (Edna Acosta-Belén & Barbara R. Sjostrom eds., 1988).

219. See YOUNG, *supra* note 217, at 24.

220. The Bureau of the Census informs the public about racial and cultural heterogeneity. Race and ethnicity statistics are compiled from three different questions on basic census data forms sent to households around the United States every ten years. The most important aspect of this information is that it is entirely self-reported.

continuous need to track the influence of migration.<sup>221</sup> To that end, in 1860, Indian and Chinese were added, and Japanese was added in 1870. The growth of the Mexican population after 1910 led to a new category being added to the race/color question in the 1930 census.<sup>222</sup> The coding instructions for the race/color entry stipulated that "all persons born in Mexico, or having parents born in Mexico, who are definitely not White, Negro, Indian, Chinese or Japanese, should be returned as Mexican."<sup>223</sup> This entry in the 1930 census was the first time that a nationality was formally recognized as a race.

*a. The Censuses: 1940, 1950, 1960 and 1970—Conflation by Another Race*

The Censuses of 1940, 1950, 1960 and 1970 illustrate a change in the conflation; first Mexicans, then other Latin American origin populations, ceased to be a separate race, and were declared to be "White." The conflation of Mexican nationality and the "White" category started with the 1940 census. The coding instructions in 1940 stipulated that "Mexicans were to be listed as White, unless they were definitely Indian or some other race other than White."<sup>224</sup> The census of 1950 reported that there were three major races: White, Negro and Other. The coding instructions in 1950 stated that "[p]ersons of Mexican birth or ancestry who are not definitely Indian or other non-white race, were classified as white."<sup>225</sup>

The coding instructions in both the 1940 and 1950 censuses, instructing the persons to choose White unless they were "definitely Indian or some other race other than White" transformed the conflationary images of Mexicans from one race to another. The significance of this change is two-fold. First, the conflation is still of nationality for race, although instead of "another" race, it is with the white race. Thus, the change of the conflation illustrated in these two censuses demonstrates a conflation in transition, constructed by the ideas about race. Second, the new conflation effectively obliterates the "Indians" of the Mexican populations. As Jack Forbes argues, "[w]ith any mixture of bloods the 'Indian' is sup-

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221. See UNITED STATES BUREAU OF THE CENSUS: HISTORICAL STATISTICS OF THE U.S.: COLONIAL TIMES TO 1970 (1975).

222. *Id.*

223. UNITED STATES BUREAU OF THE CENSUS CONSISTENCY OF REPORTING OF ETHNIC ORIGIN IN THE CURRENT POPULATION SURVEY 52 (U.S. Bureau of the Census Technical Paper No. 31, Washington, D.C., 1979).

224. *Id.* at 61.

225. BUREAU OF THE CENSUS: 1950 CENSUS OF THE POPULATION: TRACTED CITIES (California) 2 (1952).

posed to disappear, that is, to be 'blanched' out, becoming white."<sup>226</sup>

The increase in the 1950s of the Puerto Rican population living in the mainland mandated more information about Puerto Ricans.<sup>227</sup> Thus, the 1960 census stated that "Puerto Ricans, Mexicans or other persons of Latin descent would be classified as "White" unless they were definitely Negro, Indian, or some other race." In addition, the Spanish surname criterion was used to approximate the Mexican origin population in the five southwestern states.<sup>228</sup> In New York State

226. See Jack D. Forbes, *The Hispanic Spin: Party Politics and Governmental Manipulation of Ethnic Identity*, 19 *LATIN AM. PERSP.* 59, 59 (1992).

227. The number of Puerto Ricans in the United States before the island became a U.S. possession was small and consisted largely of prosperous merchants, political activists, and tobacco workers. Some 2,000 Puerto Ricans lived on the mainland in 1900; most of these were in New York City. Significant immigration to the mainland in response to unemployment and poverty on the island began in the late 1920s, and a somewhat smaller group came in the late 1930s. By 1940 mainland Puerto Ricans numbered almost 70,000; most continued to reside in various sections of New York City. Over the next two decades the number increased more than tenfold, to 887,000, the period called the "great migration." Between 1945 and 1970 about one in three Puerto Ricans left the island. Thousands were farm workers forced out of work by the aforementioned changes in agriculture. Puerto Rican communities were established in New Jersey, Connecticut, and Chicago, although the majority of new immigrants continued to settle in New York. See López, *supra* note 50, at 318; CLARA E. RODRIGUEZ, *PUERTO RICANS: BORN IN THE U.S.A.* 1-10 (1989). Jack Agueros describes the surge of new immigration on established Puerto Rican communities on the mainland:

[World War II] ended and the heavy Puerto Rican migration began. . . . Into an ancient neighborhood came pouring four to five times more people than it had been designed to hold. Men who came running at the promise of jobs were jobless as the war ended. They were confused. They could not see the economic forces that ruled their lives as they drank beer on the corners, reassuring themselves of good times to come while they were hell-bent toward alcoholism. The sudden surge in numbers caused new resentments, and prejudice was intensified. Some were forced to live in cellars, and were then characterized as cave dwellers. Kids came who were confused by the new surroundings; their Puerto Ricanness forced us against a mirror asking, "If they are Puerto Ricans, what are we?" and thus they confused us. In our confusion we were sometimes pathetically reaching out, sometimes pathologically striking out. . . . Education collapsed. Every classroom had ten kids who spoke no English.

JACK AGUEROS, *HALFWAY TO DICK AND JANE IN THE IMMIGRANT EXPERIENCE: THE ANGUISH OF BECOMING AMERICAN* 93 (Thomas C. Wheeler ed., 1971).

228. The Bureau of the Census (as a result of intense pressure from Mexican-American groups) conducted a current population survey which had a specific sub-focus on Spanish-surnamed persons for the first time. In April, 1971, the Bureau published a report on *Characteristics of the Population by Ethnic Origin: November, 1969* which lumped Mexicans and all other Spanish-surnamed or Indo-Hispanic groups together as "Spanish" in the tables. American Indians, Negroes, and most other nonwhite groups were simply thrown together in the "Other" category. Census officials stated that the data in the report on individuals of "Spanish" origin was, for the first time, based on questions asking individuals to self-identify based on origin or descent. Previously, officials had to infer a respondents national origin from information such as place of birth, country of origin, native language and surname. See MORTON H. SKLAR & MARGARET A. COTTER, *THE RACIAL DATA POLICIES AND CAPABILITIES OF THE FEDERAL GOVERNMENT* (U.S. Interagency Committee on Uniform Civil Rights Policies and Prac-

only, a question was asked about birthplace with three possible answers: United States, Puerto Rico, Elsewhere.

As a result of the political pressure by Latino groups in the 1960s,<sup>229</sup> the 1970 census adopted the category "Spanish heritage population."<sup>230</sup>

In 1969, the Bureau of the Census began attempting to create a new, fictitious group of people called "Spanish," "Spanish Origin," "Spanish Heritage," or other forms of the specific national designation "Spanish." It should be stressed that "Spanish" refers directly to Spain as a country and to a European, white nationality. Contrary to popular usage, "Spanish" does not refer to a specified language, since Castillian, Gallego, Catalán and Basque are all equally "Spanish" languages. In choosing to create a "Spanish Origin" group, the Census Bureau consciously conceived of this population as overwhelmingly "White" and "Indo-European." The Spanish Heritage population was defined as (i) Spanish surname or Spanish language in the five southwestern states; (ii) Puerto Rican birth or parentage in the three middle Atlantic states; and (iii) Spanish language in the remaining 42 states.<sup>231</sup>

#### *b. The 1980 Census*

For both political and statistical reasons,<sup>232</sup> efforts to improve the coverage of the Latin American origin population led to the use

tices, Subcommittee on Racial Data Collection, 1971).

229. See López, *supra* note 40, at 79. Among the many accomplishments of Latino political activism of this generation were the desegregation of public facilities such as theaters and swimming pools, the removal of discriminatory housing practices, increased political representation, and greater unionization of Mexican-American workers. Ignacio García insists that these reforms be "seen as part of a historical process of change" and argues that together they formed the foundation upon which the better-known Chicano movement was built. See IGNACIO M. GARCÍA, UNITED WE WIN: THE RISE AND FALL OF LA RAZA UNIDA PARTY, (1989); see generally MARIO T. GARCÍA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, AND IDENTITY, 1930-1960 364 (1989); JUAN GÓMEZ-QUIÑONES, CHICANO POLITICS: REALITY AND PROMISE, 1940-1990, 265 (1990); CARLOS MUÑOZ, JR., YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT 216 (1990).

230. U.S. BUREAU OF THE CENSUS, *supra* note 223, at 70.

231. See J. S. SIEGEL, COVERAGE OF THE HISPANIC POPULATION OF THE UNITED STATES 34 (1979).

In any case, the Bureau attempted to persuade us that Mexicans in the United States were 98.1% "white" while "Spanish origin" persons as a whole were 93.3% "white." The Bureau also sought to boost the totals of the "Spanish Heritage" population by counting all persons as "Spanish Heritage" in a household where only the "head or wife reported Spanish as his or her mother tongue" as well as all persons with a so-called Spanish surname in the five southwestern states. Thus, many intermarried persons were thrown into this category even if of non-Latin American background.

See U.S. BUREAU OF CENSUS, SUBJECT REPORTS: PERSONS OF SPANISH ORIGIN, 1970 CENSUS OF POPULATION PC (2)-IC VII, IX, 46, Appendix at 5-6 (1973).

232. See generally Ira S. Lowry, The Science and Politics of Ethnic Enumeration, RAND PAPER SERIES P-6435 (1980).

of several items designating Latin American national origin or ancestry in the 1980 Census of Population and Housing (the 1980 Census). The 1980 Census included an item on the 100 percent enumeration schedule which required all households to indicate whether their members were of Spanish/Hispanic origin or descent.<sup>233</sup> Those responding affirmatively were asked to indicate whether their origin was Mexican, Puerto Rican, Cuban, or other Spanish/Hispanic Origin.<sup>234</sup> The accompanying instructions for this question read as follows:

A person is of Spanish/Hispanic origin or descent if the person identifies his or her ancestry with one of the listed groups, that is, Mexican, Puerto Rican, etc. Origin or descent (ancestry) may be viewed as the nationality group, the lineage, or country in which the person or person's parents or ancestors were born.<sup>235</sup>

Although the "Spanish/Hispanic" choice in the 1980 Census was intended as a mixture of a culturally derived term that was partially operationalized by nationality and partially by culture, the result was the expansion of the conflation. First, the instructions for the "origin or descent" question failed to provide a workable definition for the "Spanish/Hispanic" choice. The instructions fail to differentiate between the Spanish/Hispanic as a national origin or a race.

According to demographers analyzing the 1980 Census responses, forty percent of those classified as "Hispanics" using secondary identifiers<sup>236</sup> gave a negative answer to the Spanish/Hispanic origin Census question. Instead, they wrote their country of origin in the space left for "Other" in the question designed to establish race.<sup>237</sup> Those in the Latin American origin population which exhibited the greatest "consistency," self-identifying as "Spanish/Hispanic" in addition to secondary "Hispanic" identifiers, were

233. Question 7 on the 1980 Census read as follows:

Is this person of Spanish/Hispanic origin or descent?

No (not Spanish/Hispanic)

Yes, Mexican, Mexican American, Chicano

Yes, Puerto Rican

Yes, Cuban

Yes, other Spanish/Hispanic

The term "Hispanic" was created by the federal Office of Management and Budget in 1970. The term "Hispanic" was operationalized as: "A person of Mexican, Puerto Rican, Cuban, Central or South America or other Spanish culture or origin, regardless of race." *Id.*

234. U.S. BUREAU OF THE CENSUS, PERSONS OF SPANISH ORIGIN IN THE UNITED STATES, (Series Publication No. 354, March 1979).

235. *Id.*

236. Secondary "Hispanic" identifiers in the 1980 Census are: place of birth, ancestry, Spanish "race," surname, and language. *Id.*

237. See D. E. Hayes-Bautista & J. Chapa, *Latino Terminology: Conceptual Basis for Standardized Terminology*, 77 AM. J. PUB. HEALTH 61, 61-68 (1987).

primarily of Mexican and Puerto Rican origins.<sup>238</sup> In addition, this group had considerably lower socioeconomic status (in terms of income, occupation, and education) than the "inconsistent" forty percent mentioned above. "Inconsistent" respondents were primarily Central and South Americans; a small percentage were Puerto Ricans and Cubans.<sup>239</sup>

The 1980 Census analysis illustrates the institutionalized conflation of Latino's race and nationality. The question intended to elicit the "race" of the respondent is poorly constructed; it cues people for racial categories and national origin. According to F.M. Treviño, the analysis demonstrated that the "inconsistent" respondents "perceive Hispanic ethnicity to constitute a race."<sup>240</sup> Against this view, Tienda and Ortiz argue that:

[T]hese individuals were likely to be Hispanics with ambivalent ethnic identities who misreported their origin either because they objected to the lack of response choices on the full-enumeration item (e.g., as Venezuelan, Argentine, etc. choices), or who deliberately denied their Hispanic origins. . . . [I]nconsistent "Hispanic" [sic] respondents . . . appear to exhibit ambiguity about their "Hispanicity" [sic].<sup>241</sup>

The issue of ambiguity about a person's "Hispanicity" is patronizing, and it ignores the social construction of the "Hispanic" label. As Martha Gimenez argues:

That many respondents chose to write their national origin where they did, while declining to accept a "Spanish/Hispanic origin," reveals, in all likelihood, neither error, ignorance, or an effort to hide an embarrassing "ethnic" identity, but rejection of the coercive nature of the self-identification question. The question forces respondents to agree to having "Spanish/Hispanic" origin, something which for a substantial number of people makes no sense, both in terms of their actual ancestry and/or in terms of their historical sense of who they are and/or (in the case of Latin Americans) their nationalist allegiance to their country of origin. The status inconsistency perspective is a subtle exercise in "majority" power. It "scientifically" neutralizes the assertion of an alternative identity (or the scholarly critique of the label, as the case may be), ignoring its historical structural determinants and reducing it to the effect of psychological states; i.e., suppression of, or ambivalence about, "real" "ethnic identity," an identity that exists mainly in the eyes of the "majority" beholder.<sup>242</sup>

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238. See F.M. Treviño, *Standardized Terminology for Standardized Populations*, 77 AM J. PUB. HEALTH 69, 69-72 (1987).

239. *Id.*

240. *Id.* at 70.

241. See M. Tienda & V. Ortiz, *Hispanicity and the 1980 Census*, 67 SOC. SCI. Q. 3, 11-15 (1986).

242. See Martha E. Gimenez, *Latino/"Hispanic"—Who Needs a Name? The Case*

## IV. THE CONFLATION IN CONTEMPORARY JURISPRUDENCE

A. *Judicial Constructions of Race and Nationality*1. *Race*

Law mirrors society. As Neil Gotanda has recently demonstrated, the term "race" has been used to stand for several different concepts.<sup>243</sup> A survey of the Supreme Court's varying definitions of race reveals that unitary definitions and either/or frameworks prevail in judicial attempts to determine the meaning of "race."

In legal discourse, the notion that race is constructed in social contexts and has had a multitude of meanings is virtually nonexistent. The idea that race is fixed and inherited remains widely accepted and reflected in the law. The Supreme Court adopted this conception of law in *Shaw v. Reno*.<sup>244</sup>

In a controversial ruling holding that a majority black congressional district may violate the constitutional rights of white voters, the Supreme Court constructed a biological conception of race. In *Shaw v. Reno*, five white voters challenged a state-enacted reapportionment plan as an impermissible racial gerrymander.<sup>245</sup> The Court held that the plaintiffs could make a cognizable claim under the Equal Protection Clause of the Fourteenth Amendment "by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."<sup>246</sup> In a sharply divided opinion, Justice O'Connor, writing for the majority, rejected the district court's conclusion that the white voters did not state a claim under the Equal Protection Clause. Justice O'Connor points out that "reapportionment is one area in which appearances do matter," and a "reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."<sup>247</sup> Justice O'Connor then established that the level of review on remand was to

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*Against Standardized Terminology*, 19 INT'L J. HEALTH SERVICES 557, 566 (1989).

243. See Gotanda, *supra* note 90. See also Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074 (1980).

244. 113 S. Ct. 2816 (1993).

245. *Id.*

246. *Id.* at 2828.

247. *Id.* at 2827.



be strict scrutiny, and the lower court was instructed to determine "whether the North Carolina plan [was] narrowly tailored to further a compelling governmental interest."<sup>248</sup>

In suggesting that minority-majority districts bring together those "who may have little in common with one another but the color of their skin,"<sup>249</sup> the majority is constructing a biological definition of race.<sup>250</sup> She defines race as skin color in order to establish that we should not recognize race since it means nothing more than skin color. As A. Leon Higginbotham argues, "[u]ltimately the Supreme Court majority accomplishes what it cautions the plaintiffs not to do: it confuses the ideal of a color-blind society with the reality of our race-conscious society."<sup>251</sup>

248. *Id.* at 2832. Justice O'Connor maintained that creating majority-minority districts in order to comply with the Voting Rights Act does not by itself meet the compelling interest requirement under strict scrutiny. Justice O'Connor argued that a state must have a strong basis in evidence for concluding that the remedial action was necessary. According to the Court, a districting plan triggers strict scrutiny when a district is "so extremely irregular on its face" that it unequivocally reflects an effort to separate citizens on the basis of race. *Id.* at 2824. In *Shaw*, the triggering factors were: (1) that one district was "somewhat hook shaped," tapering to "a narrow band," with "finger-like extensions," resembling a "bug splattered on a windshield," and (2) that the second district wound "in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobble[d] in enough enclaves of black neighborhoods,'" *Id.* at 2820-21, becoming so narrow in parts that "'if you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" (quoting state representative Mickey Michaux, in John Biskupic, *N.C. Case to Pose Test of Racial Redistricting*, WASH. POST, Apr. 20, 1993, at A4).

249. *Shaw*, 113 S. Ct. at 2827.

250. By biological race, I mean that there is a genetic and physical basis for categorizing people into different races based on physical characteristics transmitted by descent. Immanuel Kant's use of the German phrase for "races of mankind" in the 1770s was probably the first explicit use of the term in the sense of biologically distinct categories of human beings. See generally MICHAEL BANTON, *RACIAL THEORIES* (1987) (tracing the historical development of racial conceptions). See also ROBERT MILES, *RACISM* (1989) (discussing differences underlying racism). Ian F. Haney López argues that the concept of "biological race" maintains that:

there exist natural, physical divisions among humans that are hereditary, reflected in morphology, and roughly but correctly captured by terms like Black, White, and Asian (or Negroid, Caucasoid, and Mongoloid). Under this view, one's ancestors and epidermis ineluctably determine membership in a genetically defined racial group. The connection between human physiology and racial status is concrete . . . .

Haney López, *supra* note 143, at 6. Neil Gotanda does not refer to Justice O'Connor's "skin color" argument as "biological race," but as "formal race." Formal race refers to the following:

Black and white are seen as neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin. Formal-race is unrelated to ability, disadvantage, or moral culpability. Moreover, formal-race categories are unconnected to social attributes such as culture, education, wealth, or language. This 'unconnectedness' is the defining characteristic of formal-race, and no other usage of 'race' incorporates the concept.

Gotanda, *supra* note 90, at 4.

251. A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions With Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1628 (1994).

The Court majority does more than limit race to its biological component; it utilizes this limitation to contrast biological race with social race<sup>252</sup> in order to undermine the validity of race-consciousness, and thus race-conscious remedies. The Court stated:

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. ("Even in the pursuit of remedial objectives, an explicit polity of assignment by race may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.")<sup>253</sup>

Criticizing the majority, Justice White recognizes different definitions of race. For Justice White, the Court has the power to consider history and social context in determining whether a use of race is constitutional.<sup>254</sup> He cites the Court's holding in *White v. Regester*<sup>255</sup> that "the historic and present condition of the Mexican-American community, a status of cultural and economic marginality, as well as the legislature's unresponsiveness to the group's interests," justified the conclusion that Mexican-Americans were "effectively removed from the political processes."<sup>256</sup>

## 2. Nationality/National Origin

The legal equivalent to nationality is "national origin."<sup>257</sup> National origin is a protected characteristic under the Equal Protection Clause of the Fourteenth Amendment,<sup>258</sup> and Title VII of the Civil Rights Act of 1964.<sup>259</sup>

252. See *Shaw*, 113 S. Ct. at 2824 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); see also *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (citations omitted).

253. *Shaw*, 113 S. Ct. at 2824-25.

254. *Id.* at 2834.

255. 412 U.S. 755 (1973).

256. *Shaw*, 113 S. Ct. at 2835 (quoting *White*, 412 U.S. at 767-69 (citations omitted)). In his dissenting opinion, Justice Souter also recognizes an alternative view of race. He contends that "[a]s long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like 'minority voting strength' and 'dilution of minority votes,' . . . and as long as racial bloc voting takes place, legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt." *Id.* at 2845 (Souter, J., dissenting). Souter acknowledges that "members of the same race often have shared interests" other than physical appearance. *Id.* at 2846.

257. See, e.g., *Hernandez v. New York*, 500 U.S. 352 (1991).

258. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAWS § 14.3 573-90 (4th ed. 1990) (describing the multi-tiered framework for equal protection review). The Fourteenth Amendment was one of the "Civil War" amendments, and its purpose was primarily to alleviate discrimination against blacks. "Whatever the natural law background of the [F]ourteenth [A]mendment, there is universal

a. "National Origin" and the Equal Protection Clause

The United States Supreme Court has held that classifications based on national origin are suspect classifications under the Equal Protection Clause.<sup>260</sup> National origin has been defined by the Court as "the nation of one's birth."<sup>261</sup> In *Hernandez v. Texas*,<sup>262</sup> the Court held that classifications based on national origin violate the Equal Protection Clause. In *Hernandez*, the evidence showed that fourteen percent of the population of Jackson County, Texas, had Mexican or Latin American surnames.<sup>263</sup> Moreover, eleven percent of males over twenty-one years old had Latino surnames, and six or seven percent of freeholders on the county's tax rolls were persons of Mexican descent.<sup>264</sup> Despite all of this statistical evidence, there was no record that any person with a Latino surname had ever been selected to serve on a jury commission or grand jury in Jackson County within the last twenty-five years.<sup>265</sup>

The Court in *Hernandez* found that these statistics established a case of discrimination against persons of Mexican descent. According to the Court, "[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment."<sup>266</sup> The Court realized that although race and color were traditional identifiers of groups that did not enjoy equal treatment, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."<sup>267</sup> The Court found that, just as color can distinguish a person's race, "Spanish names provide ready identification" of members of Mexican descent in Jackson County.<sup>268</sup>

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recognition that a fundamental purpose of the framers was to address racial discrimination in the post-Civil War period." Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1369 (1990) (reviewing WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988)). But see Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1154 (1988) (arguing that there is more than one possible reading of the amendment's purpose and that the framers could not possibly have intended it to apply only to blacks).

259. See *infra* note 370.

260. See *Hernandez*, 500 U.S. 352.

261. For an excellent discussion of "national origin" see Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary*, 36 WM. & MARY L. REV. 571, 574 (1995).

262. 347 U.S. 475 (1954).

263. *Id.* at 480.

264. *Id.* at 480-81.

265. *Id.* at 482.

266. *Id.* at 479.

267. *Id.* at 478.

268. *Id.* at 481 n.12. For other cases using surnames synonymous with "national origin" or nationality, see *Castañeda v. Partida*, 430 U.S. 482 (1977) (discrimination due to

b. "National Origin" and Title VII

National origin is also protected by Title VII of the Civil Rights Act of 1964,<sup>269</sup> which prohibits employment discrimination because of race or color, national origin, religion, and sex.<sup>270</sup> As Juan Perea argues "'national origin' discrimination remains, as it began, largely undeveloped and ineffective."<sup>271</sup> Courts have been reluctant to expand the meaning of "national origin" under Title VII to include ethnicity.<sup>272</sup> As Juan Perea contends, Mexican American employees must endure insults such as 'wetback' and demeaning labor which 'Americans . . . [do] not have to do.'<sup>273</sup> Persons who speak with "foreign" accents may be denied employment, even when they have the requisite job qualifications, because of the discomfort they may cause the employers.<sup>274</sup>

The only Supreme Court decision interpreting "national origin" under Title VII, *Espinoza v. Farah Manufacturing Co.* formulated a narrow interpretation of the term "national origin."<sup>275</sup> *Espinoza* es-

exclusion from grand jury service where the court used the terms "Spanish-surnamed" and "Mexican-American" as synonymous); and *People v. Trevino*, 39 Cal.3d 667 (Cal. 1985) (holding that "Spanish surnamed" is sufficiently descriptive of a "cognizable group" for purposes of abuses of peremptory challenges by the prosecution). Compare *Bueno-Hernandez v. Wyoming* 724 P.2d 1132 (Wyo. 1986), cert. denied, 480 U.S. 907 (1987) (the Court held that a person's Spanish surname was not sufficient to support taking judicial notice that the individual had a Mexican-American background); and *United States v. Castro*, No. 91-3144, 1992 WL 37352 (10th Cir., 1992) (showing the court's unwillingness to sustain a challenge that a Hispanic had been excluded from the jury during voir dire based only on evidence that the potential juror had a Hispanic last name). See also *United States v. Lane*, No. 90 C 1474 1990 WL 133500 (N.D. Ill., 1990) (stating that a mere reference to Spanish-appearing surnames was not sufficient to raise an inference of the discriminatory use of peremptory challenges).

269. Title VII prohibits discrimination in the workplace because of sex, race, color, religion, and national origin. 42 U.S.C. § 2000 e-2 (1988).

270. In the years since its passage, race and sex discrimination has encompassed most of Title VII's legal development. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (gender case); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (establishing action under Title VII for sexual harassment); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (gender discrimination case); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (race case); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (race case stating elements of plaintiff's prima facie case in disparate treatment action); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (race discrimination case establishing disparate impact theory). In fact, the only Supreme Court decision construing the "national origin" term of Title VII is *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

271. See Juan F. Perea, *Ethnicity and Prejudice: Re-evaluating "National Origin" Discrimination Under Title VII*, 35 WM & MARY L. REV. 805, 807 (1994).

272. *Id.* at 807-08.

273. *Id.* at 808.

274. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (employees received warning letters for speaking Spanish during working hours); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (employee fired for responding in Spanish to a fellow employee's work-related question, in violation of employer's English-only rule), cert. denied, 449 U.S. 1113 (1981).

275. See *Espinoza*, 414 U.S. 86. The Equal Employment Opportunity Commission

tablished that an employer may hire only United States citizens and not run afoul of Title VII's ban on national origin discrimination. In *Espinoza*, a New Mexico clothing manufacturer maintained a policy of hiring only United States citizens. Plaintiff, a Mexican national living in the United States, claimed that this practice constituted national origin discrimination against Mexicans.<sup>276</sup> The Court disagreed,<sup>277</sup> holding that alienage discrimination does not violate Title VII under either disparate treatment or disparate impact theories.<sup>278</sup>

Justice Marshall's opinion in *Espinoza* examined the legislative history of the term "national origin"<sup>279</sup> and construed it to mean "the country where a person was born, or, more broadly from which his or her ancestors came."<sup>280</sup> Thus, the terms "national origin" and "ancestry" were considered synonymous.

Although courts easily have embraced ancestry within the meaning of national origin, they generally have been more reluctant in interpreting Title VII to provide protection against discrimination because of other ethnic traits. As Juan Perea contends "what is usu-

(EEOC) has developed an expansive conception of national origin discrimination in its Guidelines on Discrimination because of National Origin. The EEOC states that the statute protects against discrimination "because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1993).

276. 414 U.S. at 87.

277. The district court had ruled that alienage discrimination did constitute national origin discrimination under Title VII. *Espinoza v. Farah Mfg. Co.*, 343 F.Supp. 1205 (W.D. Tex. 1971), *rev'd*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973).

278. A plaintiff may allege both theories on the same set of facts. *See Teamsters*, 431 U.S. at 335-36 n.15. Under disparate treatment, the plaintiff claims that an employer overtly treated applicants or workers differently based on their race, national origin, or other protected attribute. For example, an employer who hires only men for certain jobs commits a prima facie violation of Title VII under the disparate treatment theory. *See BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13* (1983) [hereinafter *Schlei & Grossman*] ("The essence of disparate treatment is different treatment. . . . It does not matter whether the treatment is better or worse, only that it is different."). With disparate treatment, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Teamsters*, 431 U.S. at 335 n.15 (citation omitted). A disparate impact claim arises when an employer's facially neutral policy has the effect of discriminating against a protected class. For example, hiring only persons over six feet tall would constitute a prima facie violation of Title VII because of its disparate impact on women, as fewer women than men would meet the job requirement. *See Griggs*, 401 U.S. at 424; *Dothard*, 433 U.S. at 328-32 (invalidating height and weight restrictions for correctional officer positions because of disparate impact on women). Intent to discriminate is not necessary under disparate impact theory. *See Griggs*, 401 U.S. at 432.

279. The statute's legislative history, though quite meager in this respect, fully supports this construction. *Espinoza*, 414 U.S. at 89. The only direct definition given the phrase "national origin" is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: "It means the country from which you or your forebears came . . . . You may come from Poland, Czechoslovakia, England, France, or any other country." *Id.* (quoting 110 CONG. REC. 2549 (1964)).

*See also* Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1169, n.25 (1985).

280. 414 U.S. at 88.

ally labelled 'national origin' discrimination is actually discrimination because of a person's ethnic traits."<sup>281</sup> Thus, with respect to expressions of ethnicity, courts interpret Title VII in a manner that, "rather than encouraging equality and tolerance of difference, instead encourages uniformity and rejection of ethnic differences."<sup>282</sup>

B. *The Conflation, the Equal Protection Clause and "National Origin": Language as a Surrogate for Race*

The Supreme Court's decision in *Hernandez v. New York*<sup>283</sup> demonstrates the legacy of the historical and societal conflation operating within contemporary jurisprudence.<sup>284</sup> The conflationary practices of the Supreme Court deconstructed below disclose specific insights into how the conflation operates in law.

In *Hernandez*, the Court concluded that there was no equal protection violation when a prosecutor used peremptory challenges to exclude two bilingual Latino jurors from a jury that was expected to consider Spanish-language testimony.<sup>285</sup> The plurality opinion, authored by Justice Kennedy, uses the words "race" and "ethnicity" synonymously.<sup>286</sup> Yet, the discrimination in *Hernandez* is based on bilingualism, an ethnic characteristic shared by approximately two-thirds of Latinos.<sup>287</sup>

As discussed below, the plurality and concurring opinions in *Hernandez* demonstrate how the Supreme Court utilizes the conflationary concepts to (i) limit the protection of the Equal Protection Clause to the Court's construction of "race", which fails to appropriately include ethnicity; (ii) construct its definition of "race" within the historical black/white paradigm,<sup>288</sup> which readily excludes Latinos; and (iii) ignore the intersection of ethnicity and race, which is a large part of most Latinos' reality. As Frank Valdes argues, "the legal system simply cannot fulfill the nation's existing, formal anti-discrimination mandate"<sup>289</sup> until the conflationary practices are exposed.

281. Perea, *supra* note 271, at 809.

282. *Id.*

283. 500 U.S. 352 (1991).

284. Frank Valdes calls this phenomenon "the intersection of cultural and legal conflationary precepts and practices in contemporary America." Valdes, *supra* note 9, at 121.

285. 500 U.S. at 369-70.

286. *Id.* at 352-372.

287. JOE R. FAEGIN, RACIAL AND ETHNIC RELATIONS, 40 (1993).

288. I use the concept of paradigm as an "assumed theoretical category which classifies racial phenomena." OMI & WINANT, *supra* note 86, at 164. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1990).

289. See Valdes, *supra* note 9, at 10.

1. *Hernandez v. Texas*

a. *The Conflation and the Court's Construction of Race*

The conflation of race and ethnicity<sup>290</sup> in *Hernandez* is illustrated in Justice Kennedy's (con)fusion of the two concepts. Justice Kennedy writes that the Court must determine whether the prosecutor offered a "race-neutral" reason for excluding the two Latino jurors.<sup>291</sup> Since the Court is considering potential discrimination based on bilingualism,<sup>292</sup> an ethnic rather than a racial characteristic, it should be determining whether the prosecutor was "ethnicity-neutral," not "race-neutral." As Juan Perea argues, "this distinction is more than a semantic difference because many reasons that can be deemed 'race-neutral'—meaning 'not race'—such as bilingualism, accent, or Latino surname, may not be 'ethnicity-neutral.'"<sup>293</sup>

Justice Kennedy allowed the possibility that this ethnic trait, bilingualism, may be treated as "a surrogate for race" and thus, a violation of the Equal Protection Clause under certain circumstances. Justice Kennedy wrote:

Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even constitutional in all cases. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

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290. Ethnicity consists of a set of ethnic traits that may include, but is not limited to, national origin, ancestry, language, religion, traditions, and shared history. See HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS (Stephen Thernstrom ed., 1980). Ethnicity is an immensely complex phenomenon. Ethnic groups are characterized by some of the following features, although in combinations that vary considerably: common geographic origin; migratory status; race, language or dialect, religious faith or faiths; ties that transcend kinship, neighborhood, and community boundaries; shared traditions, values, and symbols; literature, folklore, and music; food preferences; settlement and employment patterns; special interests in regard to politics in the homeland and in the United States; institutions that specifically serve and maintain the group; an internal sense of distinctiveness; an external perception of distinctiveness. Thus, I see the conflation of ethnicity and race to be akin to the conflation of nationality and race.

291. The plurality opinion found the following. The prosecutor offered a race-neutral basis for his peremptory strikes. The issue here is the facial validity of the prosecutor's explanation, which must be based on something other than race. While the prosecutor's criterion for exclusion—whether jurors might have difficulty in accepting the translator's rendition of Spanish-language testimony—might have resulted in the disproportionate removal of prospective Latino jurors, it is proof of racially discriminatory intent or purpose that is required to show a violation of the Equal Protection Clause. *Hernandez*, 500 U.S. at 359-61.

292. The Court reasoned that the discrimination was race-neutral because it was based both on the jurors bilingualism and their demeanor, which was the basis for the prosecutor's doubt that these two Latino jurors could adhere faithfully to the official interpretation of the testimony before the court. *Id.* at 371.

293. See Perea, *supra* note 261, at 595.

And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.<sup>294</sup>

The key terms that illustrate the Court's operation of conflationary terms are "surrogate for race" and "pretext for racial discrimination." First, the majority opines, that the "proficiency in a particular language" in connection with "certain ethnic groups" should be treated as a "surrogate for race" under an equal protection analysis. Thus, the Court is constructing its definition of "race" to include, with respect to certain ethnic communities, bilingualism. Bilingualism is not recognized on its own merit, it is embodied in the Court's definition of race, leaving exposed, without protection, other ethnic traits<sup>295</sup> that may elicit discrimination and thus merit protection under the Equal Protection Clause.<sup>296</sup>

Secondly, using bilingualism or retention of Spanish proficiency as a "surrogate for race" excludes the portion of the Latino population that does not speak Spanish.<sup>297</sup>

Lastly, the plurality opinion acknowledges that a policy which strikes all who speak a certain language may be found to be "a pretext for racial discrimination."<sup>298</sup> Again, an ethnic trait is collapsed into the Court's construction of race. Defining the parameters of the Equal Protection as "racial" ones, and not ethnic ones. As Juan Perea argues, "[b]y creating a 'concept of race' that it can expand or contract at will, the Court dilutes the meaning and proper analysis of race and ethnicity under the Constitution."<sup>299</sup>

### *b. Perpetuating the Construction of Race Through Black/White Paradigm*

Both the plurality opinion and the concurring opinion in *Hernandez* perpetuate the construction of race through the black/white

294. *Hernandez*, 500 U.S. at 371-72.

295. Other ethnic traits include: skin color, physical features, gestures, mannerisms, speech, accent, surnames and ethnic insignia. See Perea, *supra* note 261, at 596 (quoting GORDON ALLPORT, *THE NATURE OF PREJUDICE* 131-32 (2d ed. 1988)).

296. *Hernandez*, 500 U.S. at 371.

297. There is strong evidence that English-language usage increases as age decreases among the Latino population. See Leabordo Estrada, *Language and Political Consciousness Among the Spanish-Speaking in the United States: A Demographic Study*, in *POLITICS AND LANGUAGE: SPANISH AND ENGLISH IN THE U.S.* (D.J.R. Bruckner ed., 1980). See generally *POLITICS AND LANGUAGE: SPANISH AND ENGLISH IN THE UNITED STATES* (1980); MEYER WEINBERG, *A CHANCE TO LEARN* (1977); Kenneth Wilson, *The Effects of Integration and Class on Black Education Attainment*, 52 *SOC. EDUC.* 84, 84-98 (1979); Kenneth Wilson & Alejandro Portes, *Immigrant Enclaves: Labor Experiences of Cubans in Miami*, 86 *AM. J. SOC.* 295, 295-319 (1980).

298. *Hernandez*, 500 U.S. at 372.

299. Perea, *supra* note 261, at 596.



paradigm.<sup>300</sup> In the concurring opinion, Justice O'Connor, joined by Justice Scalia, took a very narrow definition of race. Justice O'Connor wrote:

Upon resolution of the factfinding questions, this case is straightforward. . . . In order to demonstrate such a violation, Hernandez must prove that the prosecutor intentionally discriminated against Hispanic jurors on the basis of their race. The trial court found that the prosecutor did not have such intent, and that determination is not clearly erroneous. Hernandez has failed to meet his burden.<sup>301</sup>

Justice O'Connor makes it clear that there is no connection between race and ethnicity.

No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.<sup>302</sup>

The problem with Justice O'Connor's concurring opinion is that it tries to define "race" within the parameters of the black/white paradigm. The connotation is that of race as a physical construct, as supposed to one that is socially constructed. This groundedness on physical traits is historically based on the black/white struggles in both society and law. Unfortunately, Latinos and their ethnic traits do not fit within this binary paradigm. As such, Justice O'Connor's construction of "race" leaves Latinos with little or no protection if the discrimination is created by an ethnic trait, as opposed to a racial one.

### *c. Marginalized by the Intersection of Ethnicity and Race*

The plurality and concurring opinions in *Hernandez* construct "race" in a way that marginalizes Latinos by ignoring the intersection of ethnicity and race. As Kimberlé Crenshaw argues, the marginalization occurs due to the legal failure to comprehend the "intersectionality" of the two constructs;<sup>303</sup> in this case, race and ethnicity. Latinos are constructed by multiple influences—racism, sexism, the dominant culture's binary racial framework and minority language discrimination.<sup>304</sup> This process of intersecting yet marginalizing cre-

300. *Hernandez*, 500 U.S. at 352.

301. *Id.*

302. *Id.* at 375.

303. The exploration of "intersectionality" is one of Crenshaw's central themes. See KIMBERLÉ CRENSHAW, WHOSE STORY IS IT ANYWAY? FEMINIST AND ANTIRACIST APPROPRIATIONS OF ANITA HILL IN RACE-ING JUSTING, ENGENDER POWER 401 (Tom Morrison ed., 1992); Crenshaw, *supra* note 104.

304. See Crenshaw, *supra* note 104.

ates a "slippery-slope" for Latinos under the Equal Protection Clause.

Challenging the unitary characterization of race is not simple. By emphasizing the diversity of the Latino community as a group—ultimately highlighting the heterogeneity and complexity of the Latino population—do we begin to deconstruct the Court's analytical framework? If so, Latinos may not have any protection under the Equal Protection Clause for their "Latinismo."

## 2. *Soberal-Perez v. Heckler*

Most courts that have addressed the issue have concluded that, standing alone, language classifications do not warrant strict or heightened scrutiny under the Equal Protection Clause.<sup>305</sup> Gener-

305. Michael Arington, Note, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J. L. & POL. 325, 335 (1991) (suggesting that courts have not recognized language as a means of defining a suspect class); Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 395 (1989) (noting courts' continuing refusal to apply heightened scrutiny despite evidence of past discrimination and the propensity of language classifications to discriminate invidiously); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987) ("Courts have so far been unwilling to deem language minorities a quasi-suspect class for equal protection analysis when parties claim an affirmative right to governmental accommodation."). *Id.* at 1353-54.

Some commentators have observed that language minorities share several characteristics with other groups that receive more favorable treatment under the Equal Protection Clause. Consequently, they argue, language classifications warrant a higher degree of equal protection scrutiny. See, e.g., *id.* at 1353-55 (noting that language minorities are easily identifiable, and have suffered a history of discrimination, mistreatment, and political powerlessness).

One problem with this argument is that individuals can learn and forget how to speak a language. As a result, language-speaking ability lacks the immutability common to most other suspect characteristics. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (arguing that gender, like race and national origin, "is an immutable characteristic determined solely by the accident of birth"). Those suggesting that courts should review language classifications under heightened scrutiny typically deal with the immutability issue in two ways. First, they note that courts have applied heightened, or even strict scrutiny to classifications based on mutable characteristics. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (applying "close judicial scrutiny" to an alienage classification, even though naturalization allows individuals to change their status); see also Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 901 & n.81 (1986) (arguing that choice of religion is protected even though it is a mutable characteristic) (citing *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981)). Second, they argue that the ability to speak a language, as well as the characteristics associated with this ability, are often immutable. See *Smothers v. Benitez*, 806 F. Supp. 299, 306 (D.P.R. 1992) ("[K]nowledge of a language, insofar as it is an ethnic characteristic, leaves identifiable traces like accents, surnames and behavior patterns."); see also "Official English", *supra* note 305, at 1354 (suggesting that adults, especially those with low incomes, face particular difficulties in learning English); cf. Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 334-35 n.262 (1989) (citing a study demonstrating that learning a new language may be difficult

ally, these courts have applied the rational basis test and upheld language classifications.<sup>306</sup> A typical example of this type of treatment is the decision of the United States Court of Appeals for the Second Circuit in *Soberal-Perez v. Heckler*.<sup>307</sup> In *Soberal-Perez*, a Spanish-speaking plaintiff alleged that the failure of the Secretary of Health and Human Services to provide social security information in Spanish violated the Equal Protection Clause. The court noted that the classification did not discriminate against Hispanics as a group,<sup>308</sup> and thus determined that the classification merely warranted rational basis review.<sup>309</sup> The court reasoned that because English is the "national language" of the United States, the policy bore a rational relation to a legitimate governmental purpose.<sup>310</sup>

### C. *The Conflation, Title VII and "National Origin"*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination because of national origin, religion, sex, race, and color.<sup>311</sup> The prohibition against "national" origin discrimination remains largely undeveloped. Although the courts and the EEOC have interpreted the statutory definition of "national origin" broadly, the Supreme Court has construed the statutory very narrowly.<sup>312</sup>

With respect to Latinos and Title VII, the courts have usually referred to an earlier legislative act for definition of discrimination: § 1981 of the Civil Rights Act of 1866.<sup>313</sup> The courts have not been clear on the issue of whether discrimination based on "national origin" alone is not covered under § 1981. However, where the same discrimination could be characterized as "racial," several courts have allowed plaintiffs to base their complaints on § 1981.<sup>314</sup> In *Cu-*

for immigrants above a certain age).

306. *See, e.g.*, *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (noting the state's interest in dealing in only one language in dismissing equal protection claim); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (citing the state's finite resources to justify provision of services in English only).

307. 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).

308. *Id.* at 41.

309. *Id.* at 41-42 (concluding that the classification did not implicate Hispanics as an ethnic group because language does not identify members of a suspect class).

310. *Id.* at 42-43.

311. 42 U.S.C. § 2000 e-2 (1988).

312. *See Espinoza*, 414 U.S. at 86.

313. 42 U.S.C. §§ 1981, 1982 (1991).

314. Some courts have held that § 1981 does not encompass the claims of Hispanics when discrimination against them is viewed as national origin discrimination. *See, e.g.*, *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D.Pa. 1978) ("There is no 'practical need' to extend § 1981 protection to national origin because discrimination based on national origin is prohibited by the Civil Rights Act of 1964, 42 U.S.C. § 2000e, commonly known as Title VII."); *Plummer v. Chicago Journeyman Plumbers Local 130*, 452 F.Supp. 1127, 1142 (N.D.Ill. 1978) *rev'd*, 657 F.2d 890 (7th Cir. 1981)

(Plaintiff allowed to amend complaint which initially asserted discrimination based on national origin. "It is well settled that discrimination based on national origin is not encompassed by section 1981."); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D.Pa. 1975) (The court limited § 1981 protection to cases of discrimination where anyone in the United States was denied equal rights as white citizens in the United States. "Discrimination on other grounds, such as religion, sex, or national origin, to which white citizens may be subject, as well as white non-citizens, non-white citizens, or non-white non-citizens, is not proscribed by the statute."); *Gradilles v. Hughes Aircraft Co.*, 407 F.Supp. 865 (D.Ariz. 1975) ("The [plaintiff's] [a]llegations . . . [in the instant matter] being based solely on a claim for discrimination based on national origin are not within the confines or scope of . . . 42 U.S.C., Section 1981."). Other courts have allowed Hispanic plaintiffs and those of other ethnic groups to state a claim under § 1981 sufficient to survive a motion to dismiss. Nonetheless, courts have required the plaintiffs to amend their complaints to allege racial discrimination and to bear the burden of producing evidence that the alleged discrimination was of a racial character. See *Ortiz v. Bank of America*, 547 F.Supp. 550, 561 (1982) (citing *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. 1981)) (recognizing that the distinction between national origin and racial discrimination is an extremely difficult one to trace and holding that plaintiff's allegations of racial discrimination were sufficient to survive a motion to dismiss); *Apodaca v. General Electric Co.*, 445 F.Supp. 821, 823-24 (D.N.M. 1978) (Spanish surnamed plaintiff granted leave to amend complaint pursuant to § 1981 to allege discrimination motivated by racial perception and animus); *Martinez v. Hazelton Research Animals, Inc.*, 430 F.Supp. 186, 188 (D.Md. 1977) (Hispanic plaintiff granted leave to amend to "allege adequately [his] racial background"); *Gomez v. Pima County*, 426 F.Supp. 816, 819 (D.Ariz. 1976) (Mexican-American plaintiffs allowed to state a § 1981 claim for discrimination on the basis of race and color); *Cubas v. Rapid American Corp.*, 420 F.Supp. 663, 665-66 (E.D.Pa. 1976) (Cuban American plaintiff's § 1981 action survived motion to dismiss on the ground that the court would not determine as a matter of law that the alleged discrimination did not contain elements of racial discrimination). Compare these cases with cases in which the courts have found that the scope of § 1981 cannot be limited by any strict notion of "race." Rather, the courts recognize that the line between racial and national origin discrimination may not exist. Some courts thus conclude that plaintiffs must state a valid claim under § 1981 regardless of whether their claim is characterized as one of national origin, race, alienage or ethnicity. See *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970-72 (10th Cir. 1979) (holding that plaintiff who alleged discrimination on the basis of his Mexican-American descent had stated a valid claim under § 1981); *Madrigal v. Certainteed Corp.*, 508 F.Supp. 310, 311 (W.D.Mo. 1981) ("Section 1981 should be construed to offer protection to persons who are the objects of discrimination because prejudiced persons may perceive them to be non-white, even though such racial characterization may be unsound or debatable."); *Whatley v. Skaggs Companies, Inc.*, 502 F.Supp. 370, 376 (D.Colo. 1980) (Plaintiff's allegations of discrimination on the basis of his Mexican-American descent stated a claim under § 1981, citing *Manzanares.*); *Aponte v. National Steel service Ctr.*, 500 F.Supp. 198, 202-203 (N.D.Ill. 1980) (Plaintiff's allegation that he was discriminated against because he was Hispanic found to state a cause of action under § 1981, because "Hispanics" are frequently identified as "non-whites."); *Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 80 F.R.D. 254, 262-64 (N.D.Ill. 1978), *aff'd* 660 F.2d 1217 (7th Cir. 1981) (Mexican and Mexican-American plaintiffs found to state a cause of action under § 1981 because in analyzing discrimination against these groups race, national origin, and ethnicity may be indistinguishable.); *Ortega v. Merit Insurance Co.*, 433 F.Supp. 135, 139 (N.D.Ill. 1977) (holding that for today at least persons of Hispanic origin must be accorded the protections of § 1981.); *Enriquez v. Honeywell, Inc.*, 431 F.Supp. 901, 904-906 (W.D.Okla. 1977) ("the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible. . ."); *Budinsky v. Corning Glass Works*, 425 F.Supp. 786, 788 (W.D.Pa. 1977) (*dicta*) (stating that although the term race "may be of such doubtful sociological validity as to be scientifically meaningless," there was still a commonly accepted notion of race which included whites, blacks, Hispanics and Indians as separate

*bas v. Rapid Am. Corp., Inc.*,<sup>315</sup> the court stated that "national origin discrimination is actionable only to the extent that it is motivated by or indistinguishable from racial discrimination."<sup>316</sup> In *Enriquez v. Honeywell, Inc.*,<sup>317</sup> an Oklahoma court noted that "the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible."<sup>318</sup> What these two cases illustrate is the "slippery-slope" that the conflation creates in this area. On one hand, national origin discrimination is actionable if it is indistinguishable from racial discrimination; yet on the other, it is hardly "indiscernible."<sup>319</sup> Thus, national origin becomes a slippery construct used as a proxy for race.

### 1. *Manzanares v. Safeway Stores, Inc.*

In *Manzanares v. Safeway Stores, Inc.*, the court used the conflation to apply a "common perception" approach.<sup>320</sup> In *Manzanares*, an employee of "Mexican American descent," brought a suit against an employer for injunctive relief and damages alleging unlawful employment practices under § 1981. That is, the Court noted:

The measure is group to group, and plaintiff has alleged that the 'group' to which he belongs—those he describes as of Mexican American descent—is to be measured against the Anglos as the

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racess protected by § 1981). See also *Ramos et al. v. Flagship International, Inc.*, 612 F.Supp. 148, 152 (1985) (holding that discrimination practiced against any "non-white" group or class falls within purview of § 1981; groups based in national origin are not excluded).

315. 420 F.Supp. 663 (E.D.Pa. 1976).

316. *Id.* at 665.

317. 431 F.Supp. 901, 904 (W.D.Okla. 1977).

318. *Id.*

319. Later courts have used this analysis in allowing Hispanics to sue under § 1981. See, e.g., *Ridgeway v. International Bd. of Elec. Workers Local 134*, 466 F.Supp. 595, 597 (N.D.Ill. 1979) (finding "[t]hat plaintiff Hispanics' charge of discrimination comes within the aegis of § 1981."); *Garcia v. Rush Presbyterian-St. Luke's Medical Ctr.*, 80 F.R.D. 254, 263-64 (N.D.Ill. 1978) (There is a "practical need and a logical reason" to extend § 1981 protection to Hispanic persons, who have been traditional victims of group discrimination.); *Ortega v. Merit Ins. Co.*, 433 F.Supp. 135, 139 (N.D.Ill. 1977) (recognizing that while the "pragmatic" approach presents difficulties in that groups may "drift within and later without Section 1981 protection, . . . there is both 'a practical need and a logical reason' today to include people of Hispanic origin as a group entitled to the protection of § 1981 against claims of discrimination. . . ."); *Enriquez v. Honeywell, Inc.*, 431 F.Supp. 901 (W.D.Okla. 1977) (adopting the *Budinsky* approach accepting Hispanic classification as a class provided protection under § 1981.). See also *Aponte v. National Steel Service Ctr.*, 500 F.Supp. 198, 202 (N.D.Ill. 1980) ("Persuaded by the often quoted rationale set out in *Budinsky*."); *Badillo v. Central Steel & Wire Co.*, 89 F.R.D. 140 (N.N. Ill. 1981) (adopting the *Budinsky* approach accepting Hispanic classification provided protection under § 1981.); *Ortiz v. Bank of America*, 547 F.Supp. 550 (E.D.Cal. 1982) (allowing a Puerto Rican woman to sue under § 1981 by adopting the *Budinsky* "practical needs and logical reasons" test to determine her "racial character").

320. 593 F.2d 968 (10th Cir. 1979).

standard. . . . In this holding we consider that Mexican American, Spanish American, Spanish surname individuals, and Hispanics are equivalents, and it makes no difference whether these are terms of national origin, alienage, or whatever. It is apparent that a group so described is of such an identifiable nature that the treatment afforded its members may be measured against that afforded the Anglos.<sup>321</sup>

Thus, the court is applying a social construction model, and protecting the Hispanic "race" against discrimination under § 1981. This construction reinforces the debatable assumption that all Latinos have distinguishable characteristics of one kind or another, and it assumes that dark-skinned Mexicans and white Cubans are equally perceived.

Latinos, which are often victims of language discrimination, are unlikely to receive serious consideration from courts unless they can find a nexus<sup>322</sup> to a suspect or semi-suspect classification.

## 2. *Olagues v. Russoniello*

In *Olagues v. Russoniello*, the United States Court of Appeals for the Ninth Circuit introduced an objective test for determining whether a language classification discriminates on the basis of race or national origin.<sup>323</sup> In *Olagues*, the U.S. Attorney suspected that recent voter registration drives in the Spanish-American community in California might have misled noncitizens into believing they could vote.<sup>324</sup> Thus, he randomly gathered the names of recently registered foreign-born voters who had requested bilingual ballots and attempted to verify their citizenship status with the Immigration and

321. *Id.* at 970.

322. Although beyond the scope of this Article, another possible avenue to strict scrutiny may lie in arguing that language classifications abridge a fundamental right. *Cf.* *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying strict scrutiny to poll tax). In the context of language, a plaintiff might argue that language is a fundamental right in and of itself, Piatt, *supra* note 305, at 894-901, 906 (arguing that the right to speak one's own language is a right of all human beings), or that a language classification deprives a non-English speaker of other fundamental rights, *see, e.g.*, Laura A. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17, 35-45 (1990) (arguing that courts have recognized that English-only restrictions are unconstitutional when they burden educational or voting rights); Arington, *supra* note 305, at 336 n.71 (suggesting that language discrimination could prevent people from exercising fundamental rights such as voting).

323. 797 F.2d 1511 (9th Cir. 1986) (en banc), *vacated as moot*, 484 U.S. 806 (1987). Despite the vacated judgment, other courts have cited the decision in *Olagues* with apparent approval. *See Guitierrez*, 838 F.2d at 1039 n.6 (endorsing the analysis in *Olagues*); *Asian Am. Business Group v. City of Pomona*, 716 F.Supp. 1328, 1330 (C.D. Cal. 1989) (following the analysis of *Olagues* to invalidate municipal ordinance); *see also Smothers v. Benitez*, 806 F. Supp. 299, 307 n.12, 308 (D.P.R. 1992) (observing that the reasoning of a vacated case may remain persuasive and considering the *Olagues* test "useful," but not dispositive).

324. 797 F.2d at 1521.

Naturalization Service.<sup>325</sup> The plaintiffs subsequently filed a class action on behalf of naturalized citizens who requested voting in Spanish or Chinese.<sup>326</sup> Their complaint alleged that the U.S. Attorney had violated their rights under the Equal Protection Clause.<sup>327</sup>

The Ninth Circuit remanded the case for review under strict scrutiny standard.<sup>328</sup> In reaching its conclusion, the *Olagues* court expressly distinguished "general" classifications that discriminate between English-speaking and non-English speaking individuals, from those "specific" classifications that target particular language groups.<sup>329</sup>

The problem with this analysis by the Ninth Circuit is that it suggests that classifications imposing the same requirements on all people—regardless of their language and regardless of the intent of the state decisionmaker—do not establish the sufficient nexus with race or ethnic origin to justify strict scrutiny. Thus, the court fails to take into account the conflationary process of using language as a proxy for racial or ethnic discrimination. Indeed, while language declarations and English-only laws might disproportionately burden non-English speakers, they would be deemed non-discriminatory on a racial or ethnic classification. The court fails to recognize the fact that invidious discrimination exists in the absence of a specific classification.

### 3. *Cardona v. American Express*

The mid-1980s saw the rise of race discrimination claims filed by plaintiffs who were technically within the same racial category as the defendants they accused.

In *Cardona v. American Express Travel Related Servs. Co., Inc.*,<sup>330</sup> the court allowed a plaintiff of Colombian ancestry to state a § 1981 claim based on the fact that his employer gave more favorable treatment to Cubans and therefore discriminated against him because he was Colombian.<sup>331</sup> The court held that it is the country from which a plaintiff is descended that determines if he can state a claim under § 1981.<sup>332</sup> The defendant argued that he and the plaintiff were of the same race—the "Latin race."<sup>333</sup> The court based its

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325. *Id.* at 1513.

326. *Id.*

327. *Id.* at 1514-15.

328. *Id.* at 1521-24.

329. *Id.*

330. 720 F.Supp. 960 (S.D. Fla. 1989).

331. *Id.* at 961.

332. *Id.*

333. *Id.*

holding on the different "ethnic and cultural characteristics of each individual Latin American country."<sup>334</sup>

### C. *The Conflation, Bilingual Education and Language Rights*

Bilingual education programs are designed to teach children of limited-English proficiency (LEP) or non-English proficiency (NEP) the English language. Many Latino children of school-age are classified as being of limited English proficiency and are thus unable to learn in classes in which English is the only language spoken. When placed in a regular English-speaking class without special instruction in English, these children are effectively precluded from receiving a meaningful education. Thus, the Latino community has often endorsed bilingual-bicultural education programs, which not only promote proficiency in English but also foster literacy in the native language and respect for the child's cultural heritage. Twenty years ago, the United States Supreme Court recognized the equal educational opportunity rights of LEP and NEP children in *Lau v. Nichols*.<sup>335</sup> Although the Supreme Court in *Lau* did not expressly endorse bilingual education, the decision legitimized and gave impetus to the movement for equal educational opportunity for students who do not speak English. *Lau* raised the nation's consciousness of the need for bilingual education and encouraged additional federal legislation.

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>336</sup> In 1970, federal policy makers began to consider the relevance of Title VI to providing special instruction to non-English-proficient (NEP) and limited English-proficient (LEP) students.<sup>337</sup> That year, the Office of Civil Rights (OCR) issued a memorandum indicating that, under Title VI, "[w]here inability to speak and understand the English lan-

334. *Id.*

335. 414 U.S. 563 (1974).

336. 42 U.S.C. § 2000(d) (1982).

337. Many scholars have debated the OCR's motivation for expanding the coverage of Title VI. Some scholars have argued that Latino community leaders' efforts were the primary motivation of the OCR. See Peter Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purposes: A Suggested Approach*, 17 COLUM. J.L. & SOC. PROBS. 99, 120-22 (1981) (describing the text and legislative history of Title VI). Rachel Moran argues that "it appears more probable that federal officials at OCR were already receptive to claims that their enforcement regime also could rectify school districts' discrimination against linguistic minority students." Rachel Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1266-67 (1988).



guage excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."<sup>338</sup>

The conflation of race and nationality is evident in the OCR's expansion of Title VI's coverage. There is no evidence in Title VI's legislative history that its protections extended to linguistic minority children.<sup>339</sup> Thus, the expansion of a system originally designed to redress the grievances of racial and ethnic minorities to include those of linguistic minorities conflated the effects of race, ethnicity, language, and culture on NEP and LEP students' academic performance.<sup>340</sup>

While the *Lau* Court had recognized that a violation of Title VI could be established solely on the basis of discriminatory effect, without requiring discriminatory intent, this "effects only" test was severely eroded by the Supreme Court in *Regents of the University of California v. Bakke*.<sup>341</sup> In *Bakke*, an affirmative action case, the white plaintiff claimed that he was denied a place in medical school because sixteen spaces were reserved for minority students.<sup>342</sup> The Court held that this amounted to a total denial of education to the plaintiff because he was refused admission to a medical school to which he otherwise might have been accepted had the sixteen special admissions seats not been denied to non-minorities.<sup>343</sup>

Although the *Bakke* holding did not explicitly overrule *Lau*, it raised serious concerns regarding its applicability in future Title VI cases.<sup>344</sup> *Bakke* holds that Title VI and the Equal Protection Clause

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338. OFFICE FOR CIVIL RIGHTS (OCR) IDENTIFICATION OF DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF NATIONAL ORIGIN, 35 FED. REG. 11, 595 (1970).

339. Moran, *supra* note 337, at 1266.

340. *Id.*

341. 438 U.S. 265 (1978).

342. *Id.* at 275.

343. *Id.* at 305.

344. Rachel Moran argues:

By suggesting that something more than discriminatory effects must be shown in title VI cases, *Bakke* potentially reduced the instances in which federal officials could constrain state and local discretion on behalf of linguistic minority students. In *Lau*, the Court had presumed that school districts could reallocate resources to programs for NEP and LEP students without seriously undermining the curriculum for English-speaking students. An effects test that allowed for a broad federal role therefore was relatively palatable because linguistic minority students could be benefited without obviously harming other students. By contrast, affirmative action programs plainly imposed serious burdens on an identifiable class of whites. Under these circumstances, the Court no longer found broad-ranging federal intervention on behalf of minority students as attractive. Consequently, it sought to circumscribe federal involvement by imposing a higher threshold for finding a title VI violation.

are co-extensive, meaning the constitutional standard for equal protection must be used for Title VI. In *Lau*, the Court applied a disparate impact test in deciding the Title VI claim. The disparate impact test determines whether there has been a violation by examining the effect the action has had, regardless of the intentional nature of the action. This standard was changed in *Washington v. Davis*,<sup>345</sup> two years after the *Lau* decision. In *Washington*, the Court held that the intentional discrimination which determines whether a violation has occurred by examining only whether that action was taken with the intent to discriminate, is the only constitutional standard for equal protection.<sup>346</sup>

*Bakke* demonstrates the harmful results of the conflation. Title VI's protection covered both linguistic minority students an affirmative action beneficiaries. With the conflation at work, once the Court imposed an intent requirement under Title VI in affirmative action cases, "the legitimacy of linguistic minority students' claims based solely on the effect of English-only instruction was jeopardized."<sup>347</sup>

Since *Bakke*, plaintiffs have increasingly turned to the Equal Education Opportunities Act<sup>348</sup> as the basis for their legal challenges.

Moran, *supra* note 337, at 1292-93.

345. 426 U.S. 229 (1976).

346. In *Washington* the Supreme Court upheld a civil service test administered to police academy applicants. Although proportionately more blacks than whites failed the test, the Court found the test criteria rationally related to the test's purpose of finding qualified police officers and was not intended to discriminate against blacks. *Id.* at 245-48.

347. See Moran, *supra* note 337, at 1293.

348. 20 U.S.C. § 1703 (1982). President Nixon first proposed the Equal Education Opportunities Act in 1971. Nixon stated that the statute's purpose was to shift the current emphasis from busing to the quality of education. 118 Cong. Rec. 8,928-29 (1972). For a thorough discussion of the legislative history of the Equal Education Opportunities Act see *Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ.*, 451 F.Supp. 1324, 1330 (E.D. Mich. 1978). The Equal Education Opportunities Act created rights to education that were neither intended under Title VI nor previously protected by the Equal Protection Clause. See *United States v. Hinds County School Bd.*, 560 F.2d 619, 624 (5th Cir. 1977) (indicating that Section 1703 guarantees public school children freedom from certain state acts and practices that were not proscribed under the equal protection clause); *United States v. Texas*, 506 F.Supp. 405, 432 (E.D. Tex. 1981) (explaining that the Equal Education Opportunities Act was clearly intended to "create new substantive rights for victims of discrimination, beyond that subject to challenge on constitutional grounds."); *Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ.*, 451 F.Supp. 1324, 1331 (E.D. Mich. 1978) (explaining that the Equal Education Opportunities Act was more expansive than the Equal Protection Clause in its definition of equal educational opportunity). A violation under this Act can be found in a case of disparate impact, when one group is adversely affected to a far greater degree than any other group. See, e.g., *Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ.*, 463 F.Supp. 1027, 1032 (E.D. Mich. 1978) (the court noted that under § 1703(f) "the connection between failure to take appropriate action and race need not be in the form of an allegation of racially discriminatory purpose but may also take the form of an allegation of racially discriminatory effect."); *Cintron v. Brentwood Union Free School Dist.* 455 F.Supp. 57, 63

## V. THE AFTERMATH: THE LEGACY OF THE CONFLATION IN LAW AND SOCIETY

A closer look at the conflationary process in law and society reveals that it is an insidious phenomenon that dominates and has dominated the lives of Latinos since the nineteenth century.<sup>349</sup> The fusion and confusion of Latino's race and nationality has served to create an image of Latinos as a homogenized population, thus negating the different class experiences, linguistic, racial and ethnic distinctions within the Latino population.<sup>350</sup> In society, the historical legacy of the conflation is the institutionalization and formalization of the conflation in the twentieth century evidenced by usage of the "Hispanic" label in the United States Census, and by government agencies, social institutions, social scientists, the media and the public at large.<sup>351</sup> This "label" represents the conflation in its most formal characterization and obscures the varied social and political experiences of Latinos.<sup>352</sup>

The conflation's social and doctrinal history demonstrates that it serves to perpetuate the ideals and vision of white America. The racialization of Latinos removes them from the sphere of the imagined American self identity, and into the arena of "foreign Other."<sup>353</sup> As racialized foreign Others, Latinos have been (mis)perceived through the black/white, binary prism of American society. Thus, they have been relegated an inferior minority status. As the operation of the conflation in contemporary jurisprudence demonstrates, the conflation has limited the redress available for Latinos in the areas of equal protection, language rights, employment and bilingual education—thus violating the anti-discrimination mission of the American legal system.

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(E.D.N.Y. 1978) (finding that proposed restructuring of bilingual education plan was violative of § 1703(f) even though the purpose of the restructuring was to account for a reduction in qualified bilingual education teachers following a court order that stated that teachers were to be dismissed based on their lack of seniority. More bilingual education teachers were released than English-speaking teachers, thus causing a disparate impact in the bilingual program).

349. *See supra* notes 137-143.

350. *See supra* notes 137-143.

351. *See supra* notes 128-133 and accompanying text.

352. *See supra* notes 128-133 and accompanying text..

353. *See* Neil Gotanda, "Other Non-Whites" *In American Legal History: A Review of Justice at War*, 85 Colum. L. Rev. 1186 (1985).

A. *The Conflation in Society: Lessons and Beyond*

1. *Latinos as the Foreign Other: Exclusion From the Imaginary Nation*

As I have previously discussed, the conflatory process originated with the perception of Latinos by Anglo-Americans as foreign Others.<sup>354</sup> Specifically with Mexican-Americans and Puerto Ricans this image continued even after they were granted citizenship.<sup>355</sup> Indeed, as Neil Gotanda maintains, this perception of “foreigners” is a legacy of our racial paradigm, constructed in *Black and White*.<sup>356</sup> Gotanda suggests that “Other non-whites”—non-Black racial minorities—became incorporated in American society while the nation was still struggling with the legacy of slavery. In specifically discussing the Chinese experience, Gotanda argues:

Other non-Whites, with the exception of Native Americans, did not enter American life until the mid-nineteenth century, when small but increasing numbers of Mexicans, Chinese, and Japanese became, by annexation and immigration, part of the American nation. Early in the 1850s, while the country grappled with slavery and the inability to reconcile an increasingly divergent North and South, Chinese immigrants began to arrive. Initially, the Chinese were welcomed. Within a short time, however, their presence gave throughout the West to widespread, sustained, violent campaigns to expel them.<sup>357</sup>

The Anglo-American (mis)perception of Latinos as a foreign Other, excluded from the constructed image of the American nation, led to the development of stereotypes about the alleged laziness, backwardness, and language deficiencies of the Latino “race.” The white slaveholders who went to the Southwest had well-developed racial ideology justifying and rationalizing the subordination of African Americans. It was easy for them to stigmatize racially-mixed, often dark-skinned Mexican-Americans as intellectually and culturally inferior.

This (mis)perception of Latinos as foreign Others continues in contemporary American society. In a 1982 nationwide poll, 34 percent of the respondents felt that Mexican immigrants had been bad for the United States; only 25 percent felt Mexican immigrants had been good for the country.<sup>358</sup> A 1994 Survey by the National conference of Christians and Jews regarding interethnic attitudes found

354. *Id.*

355. *Id.* at 1188.

356. *Id.* at 1187-88.

357. *Id.*

358. RITA J. SIMON & SUSAN H. ALEXANDER, *THE AMBIVALENT WELCOME: PRINT MEDIA, PUBLIC OPINION, AND IMMIGRATION* 45 (1993).

that a majority of whites believed that Latinos lacked "ambition and the drive to succeed."<sup>359</sup> In addition, Latinos have often been portrayed in the media in a large sombrero sleeping on a burro or as a border-town prostitute.<sup>360</sup>

Scholars and historians have argued that multi-culturalism threatens the ideal that binds America together, thus perpetuating the assimilationist theories of the past and promoting the characterization of Latinos as the foreign Other. Arthur Schlesinger, Jr. argues that:

The new American nationality was inescapably English in language, ideas and institutions. The pot did not melt everybody, not even all the white immigrants; deeply bred racism put black Americans, yellow Americans, red Americans and brown Americans well outside the pale. Still, the infusion of other stocks, even of nonwhite stocks, and the experience of the New World reconfigured the British legacy and made the U.S., as we all know, a very different country from Britain. In the 20th century, new immigration laws altered the composition of the American people, and a cult of ethnicity erupted both among non-Anglo whites and among nonwhite minorities. This had many healthy consequences. The American culture at last began to give shamefully overdue recognition to the achievements of groups subordinated and spurned during the high noon of Anglo dominance, and it began to acknowledge the great swirling world beyond Europe. Americans acquired a more complex and invigorating sense of their world—and of themselves. But, pressed too far, the cult of ethnicity has unhealthy consequences. It gives rise, for example, to the conception of the U.S. as a nation composed not of individuals making their own choices but of inviolable ethnic and racial groups. It rejects the historic American goals of assimilation and integration. And, in an excess of zeal, well-intentioned people seek to transform our system of education from a means of creating "one people" into a means of promoting, celebrating and perpetuating separate ethnic origins and identities. The balance is shifting from *unum* to *pluribus*.<sup>361</sup>

Schlesinger cites ethnicity emphasis and race consciousness as diverting attention from real needs and worsening problems, declaring that this multicultural orientation is that of a "cult . . . [that] exaggerates differences, intensifies resentments and antagonisms, drives ever deeper the awful wedges between race and nationalities.

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359. NATIONAL CONFERENCE OF CHRISTIANS AND JEWS, TAKING AMERICA'S PULSE: THE NATIONAL CONFERENCE SURVEY ON INTER-GROUP RELATIONS (1994).

360. See Thomas M. Martinez, *Advertising and Racism: The Case of the Mexican American*, EL GRITO, Summer 1969, at 3-13.

361. Arthur Schlesinger, Jr., *The Cult of Ethnicity, Good and Bad*, TIME, July 8, 1991, at 21.

The end game is self-pity and self-ghettoization."<sup>362</sup> Against this view, Todd Gitlin identifies the intense controversy over "political correctness" as reflecting "the surface of a deeper fault line—a trauma in American cultural identity."<sup>363</sup>

It is essential to recognize that America's cultural identity, values, and beliefs are a product of its past and present social relations of domination and power.<sup>364</sup> Multicultural diversity is essential. Many research studies about Latinos fail to recognize the merits of multiculturalism and still utilize the assimilation perspective as a way of gauging the status of Latinos in the United States.<sup>365</sup> In reality, Latinos for the most part have had difficulties incorporating into the dominant culture and its institutions because of the heritage of the colonial situation, which has shaped the receiving conditions of the later immigrants. While others have embraced multiculturalism, the actual development of that diversity in a way that would further social justice and the more equitable distribution of power and resources is still in the midst of great controversy.

## 2. *Latinos in the "White/Black" Racial Paradigm*

Another lesson on the conflation in society is the placement of Latinos in the "White/Black" racial paradigm which dictates American society.<sup>366</sup> The racialization of Latinos in the nineteenth century formulated the conceptual framework for (mis)perceptions about Latinos. The social construction of the "Latino race" was inevitable in a society that (mis)perceives non-whites as "others." Historically, the political rhetoric of racial inferiority and multitudes of social myths and images identical to the political message have portrayed Anglo-Americans as superior beings and Latinos as inferior—leaving a legacy that permeates the fabric of American society. For most Anglo-Americans inferiority has racial connotations, and the word "race" distinguishes between black and white, as does the word "minority."

While the notion of the "Latino race" has been institutionalized in some arenas, such as the United States Census,<sup>367</sup> in others, Latinos are an ethnic group. In law, Latinos' ethnicity is most frequently considered by the Supreme Court under its concept of "national origin." But as Juan Perea notes, "[a]lthough the Court has

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362. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 102 (1992).

363. Todd Gitlin, *On the Virtues of a Loose Canon*, 8 *NEW PERSP. Q.* 53 (Summer 1991).

364. *Id.*

365. *Id.*

366. *See supra* note 302.

367. *See supra* note 37.

recently referred to a constitutional prohibition against discrimination because of ethnicity or language, the Court seems to be using the term 'ethnicity' as its unclear conception of 'race'.<sup>368</sup>

The legacies of the Black/White racial paradigm are numerous, but three in particular demand close attention. First, for Anglo-Americans to frame racial issues in strictly Black/White terms is to ignore the "other" physical races that make up the Latino population—white, Asian, and Native American. Specifically, it fails to recognize Native Americans and "meztizos," which are a significant part of the Latino racial make-up. Second, the Black/White paradigm frames the institution of racism in Black/White terms, failing to recognize other types of racism, such as racism of ethnic traits—language, accent, culture, mannerisms, and nationality. This failure of recognition has an even more devastating result: the isolation of African-Americans from potential allies in the fight against Anglo-American racism.

Third, the said paradigm "encourage[s] a tendency often found among people of color to spend too much energy understanding our lives in relation to Whiteness, obsessing about what [w]hites will think."<sup>369</sup> This concentration on whites then takes away from Latino self-definition, the construction of realities which best describe and define Latinismo.<sup>370</sup> As Elizabeth Martinez argues:

To criticize the Black-white framework is not simply a resentful demand from other people of color for equal sympathy, equal funding, equal clout, equal patronage. It is not simply us-too resentment at being ignored or minimized. It is not just another round of mindless competition in the victimhood tournament. Too often we make the categories of race, class, gender, sexuality, age, physical condition, etc., contend for the title of "most oppressed." Within "race," various population groups then compete for that top spot. Instead, we need to understand that various forms and histories of oppression exist. We need to recognize that they include differences in extent and intensity. Yet pursuing some hierarchy of competing oppressions leads us down dead-end streets where we will never find the linkage between oppressions or how to overcome them.<sup>371</sup>

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368. Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 572 (1995).

369. See Martínez, *supra* note 100, at 22-23.

370. See generally PADILLA, *supra* note 151.

371. Martínez, *supra* note 100, at 23.

### 3. *Formalized Conflation: The "Hispanic Label"*

The label<sup>372</sup> "Hispanic"<sup>373</sup> is one of the most devastating legacies of the conflation.<sup>374</sup> The label emphasizes the Spanish heritage of Latino subpopulations while ignoring the other (e.g., Native American and African) components. Suzanne Oboler notes that "precisely because labels presuppose the sacrificing of accuracy, the meanings attributed to them over time are inherently decontextualized and their usage is ahistorical."<sup>375</sup> This lack of historical contextualization is crucial when "the group has or is assumed to have a presumed negative attribute of some kind—a 'social handicap' or a perceived or real cultural, social, or racial difference."<sup>376</sup> Devoid of any historical contextualization and coupled with negative attributes, these labels do more than categorize, they stigmatize.

For Latinos, the Hispanic label embodies the conflationary constructs which have historically, and currently, operated in American society. As such, the label is enshrined in negative images of Latinos—from the "Greaser"<sup>377</sup> images of the nineteenth century to "Young Latino criminal" in television shows, such as *Baywatch* and *Acapulco H.E.A.T.*<sup>378</sup> The problem is that this label is more than just a social indicator, it is the official ethnic designator for Latinos.

The Latino response has been to use the term "Latino." This term is derived from "Latin America" and, as such, preserves the flavor of national origin and political relationship between the United States and Latin America. Latino is culturally neutral with respect to Latin American origin groups.<sup>379</sup> Since it is a Spanish

372. I use the word "label" for two reasons:

(i) I want to emphasize the "negative" aspect of the term "Hispanic," and "label" brings out that negative connotation.

(ii) It is important to emphasize the fact that the term Hispanic was construed by non-Latino forces.

373. See *supra* note 19 and accompanying text..

374. See generally *supra* notes 90-94.

375. See OBOLER, *supra* note 29, at xvi.

376. *Id.* See also *supra* notes 100-103.

377. See *supra* note 182.

378. *Study: Latino TV Characters Often Negative or Absent*, NEWSDAY, Sept. 8, 1994, at A7.

379. David E. Hayes-Bautista and Jorge Chapa note:

The term "Latino" is a generic one. It should be recognized that there are vast differences between different national origin Latino groups. Given the importance of immigration to the current explosive growth of the Latino population, it is imperative that the specific national origin of any Latino group studied be specified. The few recent studies that have investigated the social and economic characteristics of "Hispanic" subgroups have found that the differences are often greater than the similarities. There are also differences between U.S.-born and foreign-born Latinos. We strongly suspect that the same is true among direct health variables as well. For research, policy, and programmatic purposes, it is important to know if one is working with Mexican or Cuban origin Latinos. Thus, we propose that the term "Latino"



word, it provides a link with the language which unifies the Latino population. As Edward Múrguía has pointed out, these collective terms suggest different attitudes toward incorporation into or separation from the dominant Anglo culture.<sup>380</sup> While "Hispanic" suggests assimilation, or aspirations toward assimilation, "Latino suggests cultural pluralism and cultural maintenance, including the continued use of the Spanish language."<sup>381</sup>

The problem is that the term "Latino" has not been accepted as the official identifier of Latinos. Indeed, there is a debate among Latino scholars as to whether "Latino" should be the official identifier. Both defenders and critics of the label agree on the need for a standardized term to identify the Latino population. The defenders of the term "Hispanic" generally believe that pragmatically it is essential to keep the label since the statistics compiled by the federal government and government use the Hispanic label, as do social scientists and policy makers.<sup>382</sup> Secondly, on a political level, the defenders of the label maintain that it identifies a minority group subject to severe discrimination.<sup>383</sup> In Fernando M. Treviño's opinion, to replace Hispanic with Latino would undermine affirmative action protection for Hispanics because, academically defined, Latino designates "the peoples, nationalities or countries such as French, Italian, Spanish, etc., whose languages and culture are descended from Latin."<sup>384</sup>

Notwithstanding the opinions of the critics cited above, Latinos should mobilize to implement the Latino identifier as the official identifier. One of the vehicles to accomplish this endeavor is through Critical Race Theory. Thus, a discussion of Critical Race Theory, perspectives and new directions will examine how this can be accomplished.

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always carry a national origin modifier, e.g., "Mexican-origin Latino." Only when speaking of a mixed Latino population (such as the entire Latino population of the US) should the term be used without a modifier.

Hayes-Bautista & Chapa, *supra* note 237, at 61.

380. Edward Múrguía, *On Latino/Hispanic Ethnic Identity*, 2 *LATINO STUD. J.* 8, 8-18 (1991).

381. *Id.*

382. See Gimenez, *supra* note 242, at 558.

383. *Id.*

384. Fernando M. Treviño, *Standardized Terminology for Hispanic Populations*, 77 *AM. J. PUBLIC HEALTH* 69, 69-72, (1987).

## VI. CRITICAL RACE THEORY AND LATINOS: PERSPECTIVES AND NEW DIRECTIONS.

### A. *Critical Race Theory: An Overview*

At the core of Critical Race Theory<sup>385</sup> is the recognition that “race” is a fluctuating, complex host of social meanings that are formed and transformed by social, political and economic forces. Critical Race scholars see the challenge as exposing how white dominant culture, better known as racial hegemony, binds people of color into a world of oppression and subordination. As Anthony E. Cook argues, one of the major goals of Critical Race Theory “is to elucidate the ways in which those in power have socially constructed the very concept of race over time, that is, the extent to which White power has transformed certain differences in color, culture, behavior and outlook into hierarchies of privilege and subordination.”<sup>386</sup>

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385. Critical Race Theory emerged due to the “realization that the civil rights movement of the 1960s had stalled and needed new approaches to deal with the complex relationship among race, racism, and American law.” Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 745 (1993). Derrick Bell and other scholars began writing about the way “civil rights statutes and case law reinforces white-over-black domination.” *Id.* Since Derrick Bell began chronicling this phenomenon—in Derrick Bell, *The Supreme Court, 1984 Term-Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985)—there has been a veritable cornucopia of colored scholarship that is distinctly stylized. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Victor Bolden, *Judge Not, That Ye Be Not Judged: A Dramatic Call for a More Enlightened Approach to Judicial Decision-Making in Race Discrimination Cases*, 7 HARV. BLACKLETTER J. 33 (1990); Roy L. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 879 (1988); Crenshaw, *supra* note 104; Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1541 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Lawrence, *supra* note 90; Gerald P. López, *The Idea of a Constitution in the Chicano Tradition*, 37 J. LEGAL EDUC. 162 (1987); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297 (1989); Celina Romany, *Ain’t I a Feminist?*, 4 YALE J.L. & FEMINISM 23 (1991); Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Gerald Torres & Kathryn Milun, *Translating Yonondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625; Leland Ware, *The Civil Rights Act of 1990: A Dream Deferred*, 10 ST. LOUIS U. PUB. L. REV. 1 (1991); Patricia Williams, *Spirit Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127 (1987); Robert Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987).

386. Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L.

As a form of oppositional scholarship, Critical Race Theory challenges the dominant discourses on race and racism as they relate to law.<sup>387</sup> Critical Race scholars reject objective, immutable foundations for law and argue that social inequities caused by the legal system are the direct results of choices made by the dominant culture.<sup>388</sup> Critical Race Theory's central tenants is the belief that a scholar's "voice" is a distinctive "voice of color."<sup>389</sup> As such, experiences of scholars of color are legitimate and effective bases for analyzing the legal system and racial subordination.<sup>390</sup>

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REV. 1007, 1008.

387. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991) [hereinafter *Voices of America*]. I use Professor Matsuda's own definition so as not to distort the voice of critical legal scholars. For other examples of critical race scholarship, see Crenshaw, *supra* note 20; Delgado, *The Imperial Scholar*, *supra* note 103; Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) [hereinafter *Does Voice Really Matter?*]; Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Lawrence, *supra* note 87; Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990) [hereinafter *Pragmatism Modified*]; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

388. Kimberlé Crenshaw argues that "[l]aw is an essential feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable." Crenshaw, *supra* note 20, at 1351-52.

389. See *infra* notes 399-406 and accompanying text.

390. My discussion of critical race theory presents my understanding, incorporation and emphasis. Richard Delgado refers to critical race scholars in these terms:

Whatever label is applied to this loose coalition, its scholarship is characterized by the following themes: (1) an insistence on 'naming our own reality'; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform.

Delgado, *Does Voice Really Matter?*, *supra* note 387, at 95 n.1. See also Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 6-7 (1991).

B. *Critical Race Theory and Diversity: "Talking Across Our Spaces"*<sup>391</sup>

Although some Critical Race scholars have recognized the need for diversity in Critical Race Theory, the focus remains for the most part on a White/Black racial paradigm.<sup>392</sup> While it is understandable why the White/Black paradigm has been the prism that has most often been utilized by Critical Race scholars, the time has come for diversity to be embraced.<sup>393</sup> Critical Race scholars must expose the similarities of minority perspectives against the forces of white dominant rule. As Robin D. Barnes argues, "[d]istinguishing the consciousness of racial minorities requires acknowledgment of the feelings and intangible modes of perception unique to those who have historically been socially, structurally, and intellectually marginalized in the United States."<sup>394</sup>

Critical Race Theory is well-suited for this type of critical engagement, especially with respect to Latinos. As I have previously discussed, the conflation of Latinos' race and nationality has racialized the entire ethnic group. Not unlike African-Americans, the subordination of Latinos was rationalized by a series of racial and social stereotypes and "attitudes,"<sup>395</sup> that made their conditions appear natural.<sup>396</sup> The conquest of Mexico and Puerto Rico were largely rationalized through derogatory racial stereotypes which depicted a "race" of people which need to be "saved" by Anglo-Americans. As Kimberlé Crenshaw argues with respect to African

391. This term comes from Anthony E. Cook's description of the dual tensions in Critical Race Theory. He argues:

Any abstract universalism that denies the particularity of the Black experience and uncritically assimilates it into the experiences of others is problematic. Moreover, any concrete particularism that denies the possibilities of more universal connections that might bridge the gulfs that separate Black men from Black women, the Black poor from its middle class, and the Black race from other groups who have similar histories and trajectories is problematic as well. My hope is that Critical Race Theory can provide a critical process of talking across these spaces that define our separateness in ways that treasure the best of our separateness.

Cook, *supra* note 386, at 1008.

392. For a discussion of how this black/white paradigm has also excluded Asian Americans, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1267 (1993).

393. Some Critical Race Scholars have recognized the need for diversity. See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-25 (1987).

394. Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864 (1990).

395. Winthrop D. Jordan describes "attitudes" to be "discrete entities susceptible of historical analysis." WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812*, viii (1968).

396. See ACUÑA, *supra* note 107, at 209.

Americans, what is often overlooked today "is the extent to which these stereotypes serve a hegemonic function by perpetuating a mythology about both Blacks and Whites even today, reinforcing an illusion of a white community that cuts across ethnic, gender, and class lines."<sup>397</sup> For Latinos, the Hispanic label reinforces the stereotypes of the nineteenth and early twentieth centuries, portraying the illusion of a homogeneous group which in reality never existed. This illusion, spearheaded by the conflation of race and nationality, has allowed the hegemonic rule to marginalize a large number of the Latino population.

The characterization of "Otherness" by the dominant culture is another link which would unify Latinos and African-Americans by embracing diversity in Critical Race Theory. As Crenshaw notes, "[t]he establishment of an 'other' creates a bond, burgeoning common identity of all non-stigmatized parties—whose identity and interests are defined in opposition to the other."<sup>398</sup> The subordination of Latinos derived from the conflation of Latinos' race and nationality, and then the characterization of Latinos as "foreign Others."<sup>399</sup> As foreign Others, Latinos have been excluded and subordinated from the American "imagined nation."<sup>400</sup> Hence, historical discrimination and its legacy provide a fertile ground for the expansion of the White/Black racial paradigm of Critical Race Theory.

### C. *Latino Voice and Storytelling*

Voice is important in Critical Race Theory.<sup>401</sup> According to Mari Matsuda, the distinctive experiences of scholars of color should be acknowledged, valued, and utilized in a country shaped by the legacy of racial hegemony.<sup>402</sup> She proposes that those pursuing remedies for social inequality should reconstruct jurisprudence utilizing the experiences of those at the bottom rung of our socioeconomic ladders.<sup>403</sup> Thus, for Critical Race theorists, language is a social instrument.<sup>404</sup>

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397. See Crenshaw, *supra* note 20, at 1371.

398. *Id.* at 1372.

399. See *supra* notes 166-186 and accompanying text.

400. Some scholars have denounced the concept of a "minority voice." See Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV., 1745, 1801 (1989).

401. Richard Delgado excellently explains the importance of voice. See Delgado, *Does Voice Really Matter?*, *supra* note 387.

402. See Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 3-4 (1988).

403. See Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawl's Theory of Justice*, 16 N.M. L. REV. 613, 629 (1986).

404. See, e.g., Jerome Brunner, *Pragmatics of Language and Language Pragmatics*, 51 SOC. RES. 969 (1984) (arguing that language is essential to creating and operating within a social world).

Latino scholars must recount our perceptions, experiences, and understanding of law in ways which are "Latino." As subordinated and oppressed minorities, we understand the centrality of race, and specifically of constructed race, and we recognize the way that it is maintained and perpetuated in law and society.

Latinos must expose the conflationary process which has plagued us for the last two centuries, and explain how such process is a function of the hegemonic forces of racism. Latino scholars' histories are relevant to jurisprudential inquiry and to new [re]constructions of definitions of social equality and justice.

## VII. CONCLUSION

I am two parts/a person

boricua/spic

past and present

alive and oppressed

given a cultural beauty

. . . and robbed of a cultural identity

— Sandra Maria Esteves<sup>405</sup>

Consider me, if you choose, a comic victim of two cultures.

— Richard Rodriguez<sup>406</sup>

This Article has outlined and critiqued the conflation of Latinos' race and nationality from the nineteenth century to the present. This conflation continues to operate in law and society. The homogenization of the Latino population and the denial of the diversity of national, linguistic, social, historical, cultural, gendered, racial, and political experiences of Latino people merits a closer look. An exposure of the conflationary process that has oppressed and subordinated Latinos is a necessary prerequisite.

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405. SANDRA MARIA ESTEVES, *YERBA BUENA* 20 (1980).

406. RICHARD RODRIGUEZ, *HUNGER OF MEMORY* 5 (1982).

